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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

****Sherrie P. Marshall**

Andrew C. Barrett

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***Commissioner Quello designated as Chairman effective February 5, 1993.**

****Commissioner Marshall resigned effective April 30, 1993.**

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Federal Communications Commission Record

Volume 8
Issue 14

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 4309

Table of Cases
Volume 8
Issue 14

Case Name	Page
AM Radio Service Directional Antenna Performance Verification	4345
AT&T Communications	4543
Alaska Federal-State Joint Board	4372
American Telephone and Telegraph Company	4317
American Telephone and Telegraph Company	4379
Ameritech Operating Companies	4589
Amertel Electronics Corporation	4462
Artichoke Broadcasting Corporation	4531
Atlantic City Community Broadcasting, Inc.	4520
Bell Atlantic Telephone Companies	4375
BellSouth Telecommunications, Inc.	4443
Brown, Leila C.	4368
Cable TV Act of 1992 - Public Service Obligations	4370
Cable TV Act of 1992 - Rate Regulation (ERRATUM)	4511
CanXus Broadcasting Corporation	4323
Carolina Telephone and Telegraph Co.	4542
Cincinnati Bell Telephone Company	4409
Cost Allocation Uniformity Practices	4664
Crain Broadcasting, Inc.	4406
DD & TT Enterprise USA Co.	4464
Dixie Broadcasting, Inc.	4386
Dolgoff, Howard B.	4337
Elimination of Parts 34 and 35 - Annual Reports Form R and O	4318
Emision De Radio Balmaseda, Inc.	4335
Expanded Interconnection with Local Telephone Company Facilities	4569
Fee Decisions of the Managing Director	4682
GTE Hawaiian Telephone Company Incorporated	4316
GTE Hawaiian Telephone Company, Inc.	4377
GTE Service Corporation	4436
GTE Service Corporation	4438
Glaser, Michael L., Esq.	4384
Hiawathaland Cellular Limited Partnership	4460
ITU World Radiocommunication Conferences	4512
Interstate Access Tariff and Revenue Distribution Processes	4425
J.C. Maxwell Broadcasting Group, Inc.	4322
Jacor Broadcasting of Colorado, Inc.	4352
Jordan, Steven	4467
Kearsarge Telephone Company	4537
LDDS Communications, Inc.	4376
Lawton Chiles, Bob Martinez, and Bill Nelson	4342
MCI Telecommunications Corporation	4314
MCI Telecommunications Corporation	4380
MCI Telecommunications Corporation	4381
Mableton Broadcasting Company, Inc.	4373

Case Name	Page
Media West Broadcast Group, Inc.	4501
Metrocomco, Inc.	4311
Micronesian Telecommunications Corporation	4434
Moten, Leonidas R.	4427
New York Telephone Company	4325
Newspaper Association of America	4383
North Carolina Utilities Commission	4313
Oak Ridge FM, Inc.	4424
Ojeda Broadcasting, Inc.	4540
Opportunity Broadcasting of Shreveport	4348
Pacific Bell	4435
Pan American Satellite Corporation	4502
Postponement of Filing Date for Automated Form M	4351
PowerSpectrum, Inc.	4452
Price Cap Regulation of Local Exchange Carriers	4415
Regulatory Reform for Local Exchange Carriers	4545
Richards, Richard	4339
SEG Cellular Limited Partnership	4332
San Mateo County Community College District	4510
Satellite CD Radio, Inc.	4530
Sequoyah Communications, Inc.	4423
Southern New England Telephone Company	4350
Southwest Communications, Inc.	4309
Southwestern Bell Telephone Company	4441
Sunshine Cellular	4459
Sunshine Television, Inc.	4428
Sunwell International Corporation	4466
Table of Allotments, FM, Asbury, MO	4500
Table of Allotments, FM, Bowie, TX	4362
Table of Allotments, FM, Castle Rock and Colorado Springs, CO	4475
Table of Allotments, FM, Cheyenne, WY	4473
Table of Allotments, FM, Columbia, AL and Springfield, FL	4496
Table of Allotments, FM, Columbiana, AL	4494
Table of Allotments, FM, Dawson and Sasser, GA	4366
Table of Allotments, FM, Estes Park, CO	4490
Table of Allotments, FM, Livingston, MT	4364
Table of Allotments, FM, Norlina, NC	4457
Table of Allotments, FM, Oliver, PA	4456
Table of Allotments, FM, Pateros, WA	4360
Table of Allotments, FM, Prineville and Sisters, OR	4471
Table of Allotments, FM, Safford, AZ	4498
Table of Allotments, FM, Sun Valley, ID	4492
Table of Allotments, FM, Walla Walla and Waitsburg, WA	4468
Table of Allotments, TV, Cimarron, KS	4356
Table of Allotments, TV, Hoisington, KS	4358
US West Communications, Inc.	4371
US West Communications, Inc.	4449
Uniplex Telecom Technologies, Inc.	4421

Case Name	Page
Unlicensed PCS Services	4461
Validation and Billing Information for Joint Use Calling Cards	4478
Vitelcom Cellular, Inc.	4378
WNYC Communications Group	4528
WTMJ, Inc.	4354
Washington D.C. SMSA Limited Partnership	4538
Yates, Stephen W.	4340

Table of Cases by Delegated Authority and FCC Number

Volume 8
Issue 14

Delegated Authority or FCC Number	Page
DA 93 - 625	4510
DA 93 - 657	4589
DA 93 - 658	4569
DA 93 - 666	4360
DA 93 - 667	4358
DA 93 - 668	4356
DA 93 - 700	4337
DA 93 - 709	4498
DA 93 - 715	4340
DA 93 - 716	4311
DA 93 - 717	4309
DA 93 - 718	4500
DA 93 - 720	4366
DA 93 - 721	4364
DA 93 - 722	4362
DA 93 - 723	4496
DA 93 - 724	4371
DA 93 - 725	4494
DA 93 - 726	4443
DA 93 - 728	4456
DA 93 - 730	4490
DA 93 - 731	4457
DA 93 - 732	4492
DA 93 - 734	4313
DA 93 - 735	4434
DA 93 - 736	4314
DA 93 - 737	4316
DA 93 - 738	4317
DA 93 - 739	4435
DA 93 - 740	4322
DA 93 - 741	4323
DA 93 - 744	4436
DA 93 - 745	4352
DA 93 - 746	4354
DA 93 - 747	4438
DA 93 - 748	4421
DA 93 - 749	4377
DA 93 - 750	4378
DA 93 - 751	4379
DA 93 - 752	4380
DA 93 - 753	4381
DA 93 - 754	4441
DA 93 - 755	4372
DA 93 - 756	4342
DA 93 - 760	4370
DA 93 - 761	4351
DA 93 - 763	4350
DA 93 - 765	4664
DA 93 - 766	4375
DA 93 - 767	4449
DA 93 - 768	4376
DA 93 - 769	4383
DA 93 - 770	4452
DA 93 - 771	4384
DA 93 - 772	4511
DA 93 - 774	4468
DA 93 - 775	4473
DA 93 - 776	4471
DA 93 - 778	4475
DA 93 - 779	4682
DA 93 - 780	4423
DA 93 - 781	4424
DA 93 - 782	4425
DA 93 - 783	4459
DA 93 - 784	4460
DA 93 - 786	4461
DA 93 - 787	4462
DA 93 - 788	4464
DA 93 - 790	4528
DA 93 - 791	4466
DA 93 - 792	4467
DA 93 - 793	4530
DA 93 - 799	4502
DA 93 - 801	4542
DA 93 - 802	4537
DA 93 - 808	4538
DA 93 - 809	4543
FCC 93 - 253	4545
FCC 93 - 254	4478
FCC 93 - 259	4428
FCC 93 - 292	4318
FCC 93 - 302	4325
FCC 93 - 305	4339
FCC 93 - 307	4348
FCC 93 - 311	4406
FCC 93 - 315	4345
FCC 93 - 317	4332
FCC 93 - 318	4409
FCC 93 - 323	4368
FCC 93 - 324	4335
FCC 93 - 325	4415
FCC 93 - 328	4512

Delegated Authority or FCC Number	Page
FCC 93 - 335	4520
FCC 93 - 336	4427
FCC 93D - 12	4386
FCC 93D - 13	4540
FCC 93R - 31	4531
FCC 93R - 33	4373
FCC 93R - 34	4501

Table of Cases by Docket Number
Volume 8
Issue 14

Docket Number	Page
CC Dkt.No.83 - 1376	4372
CC Dkt.No.88 - 2	4383
CC Dkt.No.88 - 287	4438
CC Dkt.No.89 - 323	4409
CC Dkt.No.91 - 115	4478
CC Dkt.No.91 - 141	4569
CC Dkt.No.91 - 141	4542
CC Dkt.No.92 - 135	4545
CC Dkt.No.92 - 145	4318
CC Dkt.No.93 - 6	4425
CC Dkt.No.93 - 162	4589
CC Dkt.No.93 - 179	4415
ET Dkt.No.93 - 198	4512
ET Dkt.No.93 - 198	4512
GEN Dkt.No.86 - 285	4682
GEN Dkt.No.90 - 314	4461
MM Dkt.No.87 - 338	4531
MM Dkt.No.88 - 400	4373
MM Dkt.No.88 - 433	4520
MM Dkt.No.88 - 524	4348
MM Dkt.No.89 - 172	4475
MM Dkt.No.89 - 543	4501
MM Dkt.No.90 - 129	4496
MM Dkt.No.90 - 475	4366
MM Dkt.No.91 - 306	4498
MM Dkt.No.92 - 3	4471
MM Dkt.No.92 - 207	4386
MM Dkt.No.92 - 266	4511
MM Dkt.No.92 - 314	4456
MM Dkt.No.93 - 20	4473
MM Dkt.No.93 - 25	4370
MM Dkt.No.93 - 43	4540
MM Dkt.No.93 - 84	4500
MM Dkt.No.93 - 172	4356
MM Dkt.No.93 - 173	4358
MM Dkt.No.93 - 175	4360
MM Dkt.No.93 - 176	4339
MM Dkt.No.93 - 177	4345
MM Dkt.No.93 - 178	4337
MM Dkt.No.93 - 180	4362
MM Dkt.No.93 - 181	4364
MM Dkt.No.93 - 182	4494
MM Dkt.No.93 - 183	4492
MM Dkt.No.93 - 184	4457
MM Dkt.No.93 - 185	4490
MM Dkt.No.93 - 189	4340
MM Dkt.No.93 - 190	4311
MM Dkt.No.93 - 201	4468

Table of Cases by Rulemaking Number
Volume 8
Issue 14

Rulemaking Number	Page
RM - 6894	4475
RM - 7084	4496
RM - 7280	4366
RM - 7290	4496
RM - 7328	4366
RM - 7413	4496
RM - 7594	4345
RM - 7736	4425
RM - 7824	4498
RM - 7874	4471
RM - 7958	4471
RM - 8142	4456
RM - 8177	4473
RM - 8194	4500
RM - 8213	4468
RM - 8237	4362
RM - 8249	4490
RM - 8252	4468
RM - 8261	4356
RM - 8262	4358
RM - 8264	4360
RM - 8268	4364
RM - 8269	4494
RM - 8276	4492
RM - 8277	4457

Table of Cases by City
Volume 8
Issue 14

City/ State	Page
Asbury, MO	4500
Atlantic City, NJ	4520
Bell, CA	4464
Berlin, NH	4311
Big Pine Key, FL	4406
Bowie, TX	4362
Caribou, ME	4323
Castle Rock, CO	4475
Cheyenne, WY	4473
Cimarron, KS	4356
Colorado Springs, CO	4475
Columbia, AL	4496
Columbiana, AL	4494
Dawson, GA	4366
Decatur, AL	4386
Denver, CO	4384
Des Moines, IA	4332
Estes Park, CO	4490
Frisco, CO	4475
Hobbs, NM	4540
Hoisington, KS	4358
Jackson, MS	4322
Livingston, MT	4364
Lufkin, TX	4340
Mableton, GA	4373
Miramar Beach, FL	4337
Norlina, NC	4457
Oliver, PA	4456
Pateros, WA	4360
Pico Rivera, CA	4462
Ponte Vedra Beach, FL	4335
Prineville, OR	4471
Raton, NM	4475
Sacramento, CA	4501
Safford, AZ	4498
Salida, CO	4475
Salinas, CA	4531
San Jose, CA	4466
Sasser, GA	4366
Sedro Woolley, WA	4467
Shreveport, LA	4348
Sierra Vista, AZ	4339
Sisters, OR	4471
Springfield, FL	4496
Sun Valley, ID	4492
Tampa, FL	4342
Waitsburg, WA	4468
Walla Walla, WA	4468
Wausau, WI	4354

Subject	Page
General information	
Notice, filing of tariff to provide minimum	4449
Adjudication	
Administrative Law Judge Decision	
Financial qualifications	4335
Integration of ownership (qualitative), minority ownership	4348
Integration of ownership into management, qualitative aspect	4348, 4520
Site availability or suitability	4520
Orders or Notices	
Lottery to select licensee	4340, 4337, 4311
Review Board or Commission Decision	
Financial qualifications	4540
Misrepresentation and lack of candor	4386, 4540
Broadcast Radio Services - General Rules	
Applications	
Dismissal of application, situations which institute a	4373
General information	
Written statements of fact, the Commission may require	4386
Operating hours	
Discontinuation	4340, 4311
Schedule	4340, 4311
Program contents	
Contests	4352
Lottery information	4354, 4424, 4423
Records kept by stations	
Equal employment opportunity program	4386
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	4468, 4471, 4473, 4475 4456, 4360, 4366, 4364 4362, 4498, 4500, 4496 4494, 4490, 4492, 4457
Technical requirements	
Antenna height and power requirements	4406
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	4358, 4356

Subject	Page
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	4510
Cable signals in sites outside major and smaller markets	4528
Qualified television station, method to determine a	4528
Carriers: Service Altered	
Cable television video programming facilities	
Video programming facilities by telephone common carriers	4325
Extensions and supplements	
Applications, contents of	4309, 4314, 4316, 4317 4377, 4378, 4380, 4381 4421
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	4434, 4435, 4443, 4350 4376
Common Carriers: Miscellaneous Rules	
Allocation of costs to regulated or non-regulated costs	4313, 4664
Communications Act of 1934	
Common Carriers	
Charges, schedules of	4384
Complaints to the commission	4502
Discrimination and preferences	4384
Extension of lines, certificate for	4309, 4314, 4316, 4317 4377, 4378, 4380, 4381 4421
Service and charges	4438
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	4322, 4323, 4352, 4354 4424, 4423
Procedural and Administrative provisions	
Reconsiderations of actions taken by Commission	4460
Radio, provisions for	
Candidates for public office, facilities for	4342
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	4340, 4311
Licenses, limitation on holding and transfer of	4323
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: application procedures	
Identification of equipment	4464
Marketing of radiofrequency devices	
Devices not approved, limitations on radiofrequency	4462, 4464

Subject	Page
Jurisdictional Separations Procedures	
Facilities and property	
C&WF(Category 1),apportionment procedures in exchange line	4449
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	4332
Common carriers: complaints	
Formal or informal	4502
Common carriers: complaints, formal	
Form	4459
Hearing proceedings: hearing and intermediate decision	
Summary decision	4384, 4520
Information, general	
Rules, suspension, amendment, waiver	4569, 4438
Pleadings, briefs	
Stay, cross-reference for a request for a	4528
Proceedings, miscellaneous	
Forfeiture proceedings	4332
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	4348
Reconsideration of a final FCC action, petition	4322, 4323, 4332, 4460
Statutory Citations Other than Communications	
Administrative Procedure	
Information,public; agency rules, opinions, orders	4368
Telecommunications Companies: Classes A and B	
Nonregulated activities	4313, 4436, 4664
Regulated accounts	4313, 4436, 4664

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Authority Delegated	4425
000.291 Delegated Authority	4350
000.291 delegated authority	4443
000.291 Delegated Authority	4542
000.291 Delegated Authority	4543
000.291 Delegated Autority	4434
000.291, Delegated Authority	4435
001.003 Suspension, amendment, or waiver	4438
001.043 Requests for Stay	4528
001.106 Petitions for Reconsideration	4322
001.106 Petitions for Reconsideration	4323
001.106 Petitions for reconsideration	4332
001.106 Petitions for Reconsideration	4460
001.1107 Payment of charges	4538
001.1108 Form of payment	4538
001.1114 Penalty for late or insufficient payments	4538
001.115 Application for Review	4348
001.1870 Compliance procedures	4427
001.251 Summary decision	4384
001.251 Summary Decision	4520
001.276(f) Failure to Prosecute	4373
001.279 Limitation of Matters Reviewed	4501
001.300 of the Commission's Rules: Good Cause for Waiver	4569
001.650 Substantial and significant changes in information f	4332
001.711 Formal or Informal Complaints	4502
001.721 Formal or Informal Complaints	4375
001.721 Formal or Informal Complaints	4459
001.800 Forfeiture proceedings.	4332
002.106 Table of Frequency Allocations	4512
002.803 Authorization of Equipment	4462
002.803 Equipment requiring certification	4464
002.803 Marketing of unauthorized equipment	4466
002.925 Equipment requiring labeling	4464
022.903 Frequencies	4538
032.014 Regulated Accounts	4313
032.014 Regulated Accounts	4436
032.023 Nonregulated Activities	4313
032.023 Nonregulated Activities	4436
032.027 Transactions with Affiliates	4313
036.125, 036.154, Part 36 Appendix-Glossary, §61.41	4449
061.045 Adjustments to the PCI for LECs	4545
061.450(d)(1)(vii) Lower Formula Adjustment	4415
061.450(d)(2) Sharing	4415
063.001 Contents of Application	4309
063.001 Contents of Application	4314
063.001 Contents of Application	4316
063.001 Contents of Application	4379
063.001 Contents of Application	4380
063.001 Contents of Application	4381
063.001 Contents of Application	4421

063.001 Contents of Applications 4317
063.010 Contents of Application 4378
063.011 Contents of Application 4377
063.540 Video programming by telephone companies in their se 4325
064.702, Furnishing of Enhanced Services and CPE 4383
064.901 Allocation of Costs 4313
064.904 Independent Audits 4436
069.602 Board of Directors 4425
073.1015 truthful written statements and responses 4386
073.1211 Broadcast of lottery information 4354
073.1211 Broadcast of lottery information 4423
073.1211 Broadcast of lottery information 4424
073.1216 Contest violations 4352
073.1740 Minimum Operating Schedule 4311
073.1740 Minimum Operating Schedule 4340
073.1750 Discontinuance of Operation 4311
073.1750 Discontinuance of Operation 4340
073.202 FM Table of Allotments 4360
073.202 FM Table of Allotments 4362
073.202 FM Table of Allotments 4364
073.202 FM Table of Allotments 4366
073.202 FM Table of Allotments 4456
073.202 FM Table of Allotments 4457
073.202 FM Table of Allotments 4468
073.202 FM Table of Allotments 4471
073.202 FM Table of Allotments 4473
073.202 FM Table of Allotments 4475
073.202 FM Table of Allotments 4490
073.202 FM Table of Allotments 4492
073.202 FM Table of Allotments 4494
073.202 FM Table of Allotments 4496
073.202 FM Table of Allotments 4498
073.202 FM Table of Allotments 4500
073.202 TV Table of Allotments 4358
073.2080 equal employment opportunities 4386
073.211 Power and Antenna Height Requirements 4406
073.3522 Amendment of Applications 4531
073.3555 Multiple ownership 4428
073.3568 Dismissal of Application 4373
073.606 TV Table of Allotments 4356
076.055 Definitions applicable to the Must-Carry Rules 4528
076.057 Channel Positioning 4528
076.61(b) Complaints regarding qualified NCE stations 4510
090.631 Trunked systems loading, construction and authorizat 4452
300.201 Service and Charges 4384
300.201 Services and Charges 4438
300.202 Discrimination and Preferences 4384
300.203 Schedules of Charges 4384
300.208 Complaints 4502
300.214 Extension of Lines 4309
300.214 Extension of Lines 4314
300.214 Extension of Lines 4316
300.214 Extension of Lines 4317
300.214 Extension of Lines 4377

300.214 Extension of Lines 4378
300.214 Extension of Lines 4379
300.214 Extension of Lines 4380
300.214 Extension of Lines 4381
300.214 Extension of Lines 4421
300.214 Extension of lines 4537
300.309 Action upon Application 4311
300.309 Action upon Application 4340
300.310(d) Unauthorized transfer of control 4323
300.315(b) 4342
300.399b Noncommercial stations 4322
300.405 Reconsiderations 4460
300.503(b) Forfeitures 4322
300.503(b) Forfeitures (Memorandum Opinion and Order 4354
300.503(b) Forfeitures (Memorandum Opinion and Order) 4423
300.503(b) Forfeitures (Memorandum Opinion and Order) 4424
300.503(b) Forfeitures (Notice of Apparent Liability) 4352
300.503(b) Forfeitures; Statute of Limitations 4323
300.535 Carriage of Noncommercial Educational Television 4528
300.613 Ownership restrictions 4537
300.615 Carriage of noncommercial educational television 4510
300.752 Intl. Maritime Satellite Act, Designated Operating E 4309
300.753 Intl. Maritime Satellite Act, Implementation of Poli 4309
301.000 Authorized radio transmissions 4467
302.000 Marketing of equipment requiring certification 4462
302.000 Marketing of RF devices 4464
400.001.106 Petitions for reconsideration 4537
400.05552 Public Information; agency rules, opinions, order, ... 4368
400.063.009 Special provisions relating to projects under § 4537
400.063.054 Facilities for provision of video programming by 4537
400.063.058 Exemption 4537
400.181304 Broadcasting lottery information 4354
400.181304 Broadcasting lottery information 4423
400.81304 Broadcasting lottery information 4424
47 C.F.R. Section 0.291; delegated authority 4376
47 C.F.R. Section 201(b) and 202(a) 4441
47 CFR Part 36 4372
47 U.S.C. Section 153; Jurisdiction over Common Carrier Serv 4478
500.100 HDO 4311
500.100 HDO 4337
500.100 HDO 4340
500.2125 - Misrepresentation and Lack of Candor 4540
500.2125 misrepresentation and lack of candor 4386
500.2140 short term renewal 4386
500.2170 - Financial Qualifications 4540
500.3005 Integration of ownership into management, qualitati 4348
500.3015 Integration of ownership into management, civic 4348
500.3030 Integration of ownership into management, minority 4348
500.3035 Integration of Ownership Into Management, Quantitat 4520
500.3165 Environmental Impact 4531
500.3170 Financial Qualifications 4335
500.3180 Site Availability or Suitability 4520
500.3180 Site Availability or Suitability 4531
CHARACTER QUALIFICATION/DRUG CONVICTION 4339

DA 93-724; AAD 93-55 4371
DA 93-761 4351
From June 30 to July 14 4351
Part 1, Reporting and Recordkeeping Requirements 4318
Part 34, USOA, Comm. Com. Car., Telegraph 4318
Part 35, USOA, Comm. Com. Car., Telegraph 4318
Part 43, Comm. Com. Car., Reporting and Rcdkeep Req., Telegr 4318
Part 76 4511
Price Cap Mergers and Acquisitions 4449
Price Cap waiver C.F.R. §61.41(c) of Commission's Rules 4371
Proposed Part 99, Personal Communications Services 4461
Study Area Definition 4449

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWEST COMMUNICATIONS, INC. File No. ITC-93-102

Application for Authority to Provide Aeronautical, Maritime and International Land Mobile-Satellite Services via the Inmarsat System

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: June 17, 1993; Released: June 28, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of maritime mobile-satellite services, international aeronautical mobile-satellite services, and certain international land mobile-satellite and land-based temporary fixed-satellite services by Southwest Communications, Inc. (SCI).

2. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504 of the International Maritime Satellite Act of 1978, 47 U.S.C. §§ 752 and 753, application File No. ITC-93-102 IS GRANTED and Southwest Communications, Inc. IS AUTHORIZED to provide:

(i) maritime mobile-satellite services to ships in the Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) via Inmarsat First and Second Generation satellites;

(ii) international aeronautical mobile-satellite services in the AOR and POR via Inmarsat First and Second Generation satellites consistent with CC Docket No. 87-75 and Gen. Docket No. 84-1234; and

(iii) international land mobile-satellite services (LMSS) and land-based temporary fixed-satellite services between SCI's fixed land earth stations in the United States and mobile-satellite terminals in foreign points outside of North America[1] via Inmarsat First and Second Generation satellites. These services shall include (i) communications within and between foreign countries, excluding Canada and Mexico,[2] and (ii) communications between North America and mobile-satellite terminals located outside North America.

These services are to be provided in: 1) the Atlantic Ocean Region-East via Southwest Communications, Inc.'s authorized fixed land earth station at Staten Island, New York (call sign KA-227); and 2) the Atlantic Ocean Region-West and Pacific Ocean Region via Southwest Communications, Inc.'s authorized fixed land earth stations at Niles Canyon, California (call signs KA-63 and KA-76, respectively).

3. IT IS FURTHER ORDERED that SCI shall provide aeronautical satellite service only to aircraft in international flight as defined in the Commission's decision in CC Docket No. 87-75.

4. IT IS FURTHER ORDERED that SCI shall comply with established arrangements for handing-off aeronautical traffic between the Inmarsat system and a domestic system in accordance with the Commission's decision in CC Docket No. 87-75.

5. IT IS FURTHER ORDERED that SCI is authorized to provide international LMSS and land-based temporary fixed-satellite services only within the frequency bands specified below which are consistent with the U.S. allocation for maritime services. Thus, SCI shall serve only those land mobile-satellite and land-based temporary fixed-satellite terminals communicating in the transmit frequency band 1626.5-1645.5 MHz and the receive frequency band 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile-satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of the United States.

6. IT IS FURTHER ORDERED that SCI shall provide international LMSS via SCI's fixed land earth stations only if these earth stations have been authorized to provide this service, and are transmitting via the Inmarsat Second Generation satellites on 6425-6440 MHz and receiving on 3600-3620 MHz. SCI may also use these land earth stations when they are providing land mobile-satellite service via Inmarsat First Generation satellites transmitting on 6417.5-6425 MHz and receiving on 4192.5-4200 MHz, but only when these satellites are being used as backups to the Second Generation satellites.

7. IT IS FURTHER ORDERED that this broad authority does not cover the provision of maritime mobile-satellite, international aeronautical mobile-satellite, international land mobile-satellite or land-based temporary fixed-satellite services via any Third Generation (or later) Inmarsat satellites. In addition, SCI is authorized to provide only those services for which its land earth stations KA-227, KA-63 and KA-76 have Title III authority to provide.

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[1] For purposes of this application, North America is defined as comprising the land area of Canada, Mexico, and the United States. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

[2] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

8. IT IS FURTHER ORDERED that SCI shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

9. IT IS FURTHER ORDERED that SCI will be classified as nondominant in the provision of the services authorized herein.

10. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, and Section 504 of the Inmarsat Act, 47 U.S.C. § 754, SCI shall file such amendments to current tariffs with the Commission consistent with this decision.

11. IT IS FURTHER ORDERED that SCI shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution.

12. IT IS FURTHER ORDERED that SCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

13. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

14. This order is issued under § 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under § 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-190

In re Application of

Metrocomco, Inc.

For Renewal of License of BR-901130XE
Station WBRL(AM)
Berlin, New Hampshire

HEARING DESIGNATION ORDER

Adopted: June 17, 1993; Released: June 28, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him: (a) the captioned application for renewal of license filed by Metrocomco, Inc. ("Metrocomco") licensee of WBRL(AM), Berlin, New Hampshire; and, (b) the results of an investigation into WBRL(AM)'s silent status.[1]

2. By letter dated December 23, 1992, Metrocomco notified the Commission that WBRL(AM) had ceased broadcasting in August, 1988. Prior to this letter, Metrocomco had failed to notify the Commission regarding WBRL(AM)'s silent status. The current renewal of license application for WBRL(AM) has not been acted upon because Metrocomco has failed to respond to letters, dated March 1, 1991, March 5, 1991, and September 11, 1992, from the Assistant Chief, Audio Services Division, Mass Media Bureau, requesting information regarding the environmental impact of WBRL's RF radiation. In its December 23, 1992 letter, Metrocomco stated that it was unable to supply the RF information because its "transmitter is no longer in service and there is no staff on the premises. In addition, the tower has been removed because it was a safety hazard . . . ."

3. Seeking further clarification of the station's operational status, the Chief, AM Branch, Audio Services Division, Mass Media Bureau, by letter dated March 31, 1993, requested that Metrocomco provide further information, including information concerning its compliance with Section 73.1740 (Minimum Operating Schedule) of the Commission's Rules.[2] No response to this letter has been received. Consequently, WBRL(AM) is currently off the air without authority. This fact, coupled with the fact that WBRL(AM) has been off the air for over four years, supports our determination that Metrocomco is in apparent violation of Sections 73.1740(a)(4) and 73.1750 (Discontinuance of Operation) of the Commission's Rules.[3] We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding Metrocomco's capability and intent to resume the broadcast operations of WBRL(AM). We will therefore designate the WBRL(AM) renewal of license application for an evidentiary hearing on appropriate issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license application of Station WBRL(AM), Berlin, New Hampshire, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Metrocomco, Inc. has the capability and intent to expeditiously resume broadcast operations of WBRL(AM) consistent with the Commission's Rules.

(b) To determine whether Metrocomco, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules;

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within

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[1] The Mass Media Bureau has been delegated authority to designate for hearing the renewal of license applications of silent broadcast stations. *See Moenkopi Communications, Inc.*, 8 FCC Rcd _____, FCC 93-273, adopted May 25, 1993.

[2] Section 73.1740(a)(4) provides:

"In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[3] Section 73.1750 reads:

"The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

6. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, Metrocomco, Inc.

7. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

9. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license application of WBRL(AM), Berlin, New Hampshire, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 28, 1993

NORTH CAROLINA UTILITIES COMMISSION FILES PETITION FOR RECONSIDERATION OF COMMON CARRIER BUREAU ORDER RELATING TO AFFILIATE TRANSACTIONS

(PUBLIC COMMENT INVITED)

On June 5, 1993, the Public Staff of the North Carolina Utilities Commission (North Carolina) filed a Petition for Reconsideration of a Common Carrier Bureau Order released May 7, 1993 (8 FCC Rcd 3105, Com. Car. Bur. 1993). In that Order the Bureau addressed the treatment of affiliate transactions involving directory publishing operations described by the local exchange carriers (LECs) in their cost allocation manuals (CAMs). The Bureau required the LECs to review their CAMs to ensure that these affiliate transactions are consistent with the Commission's rules. North Carolina alleges that the Bureau's position on certain issues raised in that proceeding are inconsistent with the Commission's affiliate transaction rules.

Interested parties may file comments on North Carolina's petition no later than **July 26, 1993.** Replies should be filed by **August 10, 1993.** Comments should reference AAD 92-22 through 92-35. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also availalbe from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-93-109

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to operate capacity in the PTAT-1 Cable System and acquire connecting facilities for the provision of authorized common carrier services between the United States and Anguilla.

ORDER AND AUTHORIZATION

Adopted: June 18, 1993; Released: June 28, 1993

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 18, 1993 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and Anguilla.[1] The application was placed on public notice on March 3, 1993. No comments were received.

2. MCI is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCI has been authorized to acquire and operate capacities in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda, Antigua, Dominica, St. Kitts and Nevis, and Montserrat.[2] It now proposes to acquire and operate an additional one-half interest in eight voice-grade circuits in PTAT-1 for service to Anguilla. MCI states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from other existing common carrier facilities.

3. The Commission stated in its Private Submarine Cable Decision[3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that MCI's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that MCI's application does not raise any economic impact issues.[6]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-93-109 IS GRANTED and MCI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, and operate, a one half interest in eight (8) voice-grade circuits in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead at Devonshire, Bermuda;

b. lease and operate 8 voice-grade connecting circuits between the cablehead at Manasquan, New Jersey and MCI's West Orange, New Jersey operating center;

[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Anguilla and points beyond. We note that should MCI obtain any interest in facilities beyond Anguilla for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] *See* CICI, Inc. *et al*, 4 FCC Rcd 6622 (1989) and MCI International, Inc., 4 FCC Rcd 8446 (1989), 5 FCC Rcd 453 (1990), 5 FCC Rcd 1929 (1990), 5 FCC Rcd 7710 (1990), 7 FCC Rcd 5009 (1992), and 7 FCC Rcd 6747 (1992).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(Pacific Telecom decision).

[6] In its Pacific Telecom decision, the Commission stated that it has authority under its public interest mandate under Section 214 to consider sua sponte any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

c. acquire, on an IRU basis, and operate, a one-half interest in eight (8) voice-grade circuits in the Caribbean Atlantic Cable System (CARAC) between Devonshire, Bermuda and Chawell, Tortola;

d. lease from Cable & Wireless a one-half interest in and operate 8 voice-grade connecting circuits between the CARAC cablehead at Chawell, Tortola and the Digital Eastern Caribbean Microwave System (DECMS);

e. lease from Cable & Wireless a one-half interest in and operate 8 voice-grade circuits in the DECMS between Tortola and Anguilla; and

f. use said facilities to provide MCI's regularly authorized services between the U.S. and Anguilla.

6. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Anguilla -- that is, private lines which originate in the United States and terminate in Anguilla or which originate in Anguilla and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Anguilla end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Anguilla affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending.*

7. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

8. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondent, and a copy of the agreements, including accounting rate, shall be filed with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any license issued to PSI herein under the act entitiled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. I-T-C-93-117

Application for authority to acquire and operate facilities for service between Hawaii and New Zealand and Australia.

ORDER AND AUTHORIZATION

Adopted: June 18, 1993; Released: June 28, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-117 IS GRANTED, and GTE Hawaiian Telephone Company, Inc. (HTC) is authorized to:

a. acquire a one-half interest in and operate 83 MAUOs in the PacRimEast cable;[1]

b. acquire a one-half interest in and operate three (3) MIU's in the Tasman-2 cable;

c. acquire and operate one additional DCME terminal;

d. use 68 of the half-MAUOs in a above and the facilities in b and c above to provide HTC's regularly authorized services between Hawaii and Australia; and

e. use 15 of the half-MAUOs in a above to provide HTC's regularly authorized services between Hawaii and New Zealand.

3. IT IS FURTHER ORDERED that our authorization of HTC to provide private lines is limited to the provision of such private lines only between the United States and New Zealand or Australia -- that is, private lines which originate in the United States and terminate in New Zealand or Australia or which originate in New Zealand or Australia and terminate in the United States. In addition, HTC may not -- and HTC's tariff must state that HTC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or New Zealand or Australia end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that New Zealand or Australia affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending*.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] The remaining half-interests will be owned by OTC Limited (38 MAUOs), OPTUS Communications (30 MAUOs) and Telecom New Zealand International, Ltd. (15 MAUOs).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. I-T-C-93-123

Application for authority to lease and operate satellite circuits for service between the U.S. and the Caribbean area, Central America South America and Africa.

ORDER AND AUTHORIZATION

Adopted: June 18, 1993; Released: June 28, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed on March 9, 1993 by American Telephone & Telegraph Co. (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that grant of the requested authority to amend its blanket satellite authorization would serve the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-123 IS GRANTED and the Commission's Order and Authorization released February 18, 1993, DA 93-176, File No. I-T-C-93-006, 8 FCC Rcd 970 (1993), is modified to add the British Virgin Islands, Mexico and St. Martin to the Appendix.

3. All other terms and conditions of the Commission's blanket authorization, cited in paragraph 2 above, remain the same.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-145

In the Matter of

Elimination of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers, of the Commission's Rules and Regulations, and Elimination of Annual Reports Form R, for Radiotelegraph Carriers, and Form O, for Wire-Telegraph and Ocean-Cable Carriers and Amendment of Part 1 and Part 43 of the Commission's Rules.

REPORT AND ORDER

Adopted: June 2, 1993; Released: June 29, 1993

By the Commission:

I. INTRODUCTION

1. On July 16, 1992, the Commission released a *Notice of Proposed Rulemaking* (NPRM),[1] in which it proposed to eliminate Part 34 and Part 35 of the Commission's rules[2] and the related Annual Reports Form O and Form R. We proposed these eliminations because these accounting rules and Annual Reports have limited value to the Commission. In addition, the NPRM proposed to amend Part 43 of the Commission's rules to require radiotelegraph, wire-telegraph, and ocean-cable carriers (record carriers) with annual revenues over $100 million to file a letter each year with the Commission specifying its operating revenues and the net book value of its communications plant. Comments in support of our proposals were filed by TRT/FTC Communications, Inc., d.b.a. TRT Communications, Inc. (TRT); Western Union International, Inc. (WUI); and New Valley Corporation (New Valley), formerly Western Union Corporation. No replies were filed. For the reasons discussed in the succeeding paragraphs, we adopt our proposals with some modifications.

II. BACKGROUND

2. Record carriers having average annual revenues exceeding $50,000 are subject to the accounting requirements in Parts 34 or 35 and report their financial and statistical data and certain ownership information on Annual Reports O or R, as appropriate for the services provided. The reports are filed in accordance with Section 1.785, Annual financial reports, and Section 43.21, Annual reports of carriers and certain affiliates, of our rules. They contain information on ownership, officers and directors, debt, property and equipment, franchises, and financial operations of the reporting companies.

3. In 1981, Congress amended Section 222 of the Communications Act.[3] The Commission was required, wherever feasible, to promote the development of fully competitive domestic and international markets in the provision of record communications services. This was required to enable the public to obtain record communications services and facilities, including terminal equipment, at a competitive price. The Commission was ordered to forbear from exercising its authority under this Act as the development of competition among record carriers reduces the degree of regulation necessary to protect the public.[4] Pursuant to this mandate, the Commission, in 1983, classified all domestic record carriers as nondominant and placed them under streamlined regulation.[5] In 1985, the Commission adopted the nondominant classification and streamlined regulation for the international record carriers.[6]

III. DISCUSSION

A. Elimination of Part 34 and Part 35 and Annual Reports Form O and Form R

4. In the NPRM, the Commission proposed to eliminate Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers. It also proposed to eliminate Annual Report Form O for wire-telegraph and ocean-cable carriers, and Annual Report Form R for radiotelegraph carriers. Finally, we proposed to eliminate Section 1.793, Reports and requests to be filed under Part 34 of this chapter, and Section 1.794, Reports and requests to be filed under Part 35 of this chapter.

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[1] Elimination of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers, of the Commission's Rules and Regulations, and Elimination of Annual Reports Form R, for Radiotelegraph Carriers, and Form O, for Wire-telegraph and Ocean-Cable Carriers and Amendment of Part 1 and Part 43, CC Docket 92-145, 7 FCC Rcd 4481 (1992).

[2] 47 C.F.R. §§34.01-1 to 34.1-6-1; 47 C.F.R. §§35.01-1 to 35.1-6-1.

[3] 47 U.S.C. §222.

[4] 47 U.S.C. §222(b)(1) (1981). The current §222 was part of the Record Carrier Competition Act of 1981 (RCCA), Public Law 97-130, 95 *Stat.* 1687-90, December 29, 1981.

[5] *See* Policy and Rules Concerning Rates for Competitive Common Carriers Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 FCC 2d 554 (1983), *vacated on other grounds*, AT&T v. FCC, No. 92-1053 (D.C. Cir. Nov. 13, 1992); *see generally* Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873 (1989) (affirming nondominant status of domestic carriers other than AT&T and local exchange carriers).

[6] *See* International Competitive Carrier Policies, 102 FCC 2d 812 (1985).

5. All three commenting parties support and reaffirm the Commission's justifications for its proposals, namely that (1) record communications services have long been provided in a fully competitive environment and the rates for these services have not been subject to rate of return regulation by the Commission for a number of years; (2) the prescription of a system of accounts and annual financial reports for record carriers no longer fulfills any regulatory purpose; (3) the maintenance of the current regulations places a tremendous burden on the record carriers; and (4) the existing systems of accounts in Parts 34 and 35 are substantially out of date and are in some instances inconsistent with generally accepted accounting principles (GAAP).[7] TRT states that if the Commission were to retain prescribed accounting for record carriers, it would be obligated to revise substantially the present system of accounts, an effort that would be wasteful of Commission resources because there is no longer any need for prescribed accounting for competitive, non-dominant record carriers.[8] New Valley states that the burdens imposed by these reporting requirements on the record carriers, as well as on the Commission, cannot be justified given the absence of any benefits derived from the reports and accounting requirements, the need to enhance U.S. industrial competitiveness, and federal budgetary constraints.[9]

6. In recognition of our reduced need for uniform accounting and detailed reporting by record carriers, we (1) eliminate Parts 34 and 35; (2) revise Section 1.785 as it applies to record carriers; and (3) eliminate Sections 1.793 and 1.794.

B. Amendment of Section 43.21, Annual Reports of Carriers and Certain Affiliates

7. In the NPRM, we also proposed to amend Section 43.21 to require record carriers with annual revenues over $100 million to file a letter each year with the Commission detailing their operating revenues and net book value of their communications plant. The commenting parties have no objection to filing such letters. New Valley states that this reduction of the reporting requirements, as proposed by the Commission, is clearly consistent with Congress's mandate that the Commission forbear from exercising its authority over record carriers.[10]

8. Recent developments in the international record carrier segment of the industry, and recent annual reporting revenue data, however, have persuaded us to modify our proposed amendments to Section 43.21. We will require record carriers with annual operating revenue over $75 million, rather than $100 million as proposed in the NPRM, to file the annual letter with the Commission. We also modify the requirements of the annual letter to include some disaggregation of revenue by service category, instead of total operating revenue. Data available at the Commission,[11] show a trend toward a smaller number of carriers providing international record services and an increase in the concentration of carriers in the record service submarkets, since we issued our International Competitive Carrier decision in 1985. In contrast to the seven carriers that provided record services in 1985, recent information indicates that apparently three carriers now provide exchange telex and message telegraph service. We believe that changing conditions require us to collect data that will enable us to track operating results of the record carriers. Setting the revenue requirement threshold at $75 million insures we receive information from the major record carriers. Some additional information beyond our initial proposal will enable us to monitor developments in the international communications industry and the record carrier segment of the industry, while still substantially reducing the reporting burden on record carriers. We have attached a one-page income statement and balance sheet, which encompasses the information necessary for our regulatory oversight.

9. This action is consistent with recent decisions by the Common Carrier Bureau which, in the recognition of the reduced need for the data in Forms O and R, has granted waivers to these carriers for the last three years and substantially reduced the amount of information to be filed.[12] Therefore, we require that each record carrier with annual revenues over $75 million file an annual letter which includes the information on the attached income statement and balance sheet. The amendments to Part 1 and Part 43 are contained in Appendix A.[13] and the income statement and balance sheet are in Appendix B.

10. The elimination of the accounting rules contained in Part 34 and Part 35 and the Annual Reports O and R does not preclude us from directing the affected carriers to file more detailed information at a later date should we subsequently determine that additional information is needed. Section 219(b) of the Act states that the Commission may require carriers subject to the Act to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act. Thus, we are authorized to require filing of additional data as needed.

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[7] TRT Comments at 2, WUI Comments at 2, and New Valley Comments at 2.

[8] TRT at 2.

[9] *Id.* at 2.

[10] New Valley Comments at 1-2.

[11] *See, e.g.*, "Trends in the International Communications Industry, 1975-1990", Common Carrier Bureau, Industry Analysis Division, December 31, 1991, and "Statistics of Communications Common Carriers", (1991/1992 Edition), Federal Communications Commission.

[12] Waiver of Certain Reporting Requirements of Annual Reports Form O and Form R, 5 FCC Rcd 2563 (1990) (1989 filings); 6 FCC Rcd 50 (1990) (1990 and 1991 filings).

[13] *See* Appendix. The text given in the Appendix for §43.21 also incorporates several changes that were adopted in previous rulemaking proceedings but were never reflected in the text of the rule as printed in the Code of Federal Regulations. *See* Annual Report of Licensees in Public Mobile Radio Services (FCC Form L), 47 F.R. 50694 (Nov. 9, 1982) (eliminating annual reporting requirement for Domestic Public Land Mobile Radio Services licensees); Elimination of Annual Report of Miscellaneous Common Carriers (Form P), 49 F.R. 10121 (March 19, 1984) (eliminating annual reporting requirement for licensees in the Domestic Public Point-to-Point Microwave Service who are miscellaneous common carriers).

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to authority contained in Sections 4, 219, 220, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 154, 219, 220, and 303, Parts 1 and Part 43 ARE AMENDED as set forth in Appendix A below, effective 90 days after publication in the Federal Register.

12. IT IS FURTHER ORDERED, that Part 34 and Part 35 of the Commission's rules and the related Annual Reports Form O and Form R will be eliminated ninety days from the date a summary of this Order is published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

47 CFR, Parts 1, 34, 35, and 43 are amended as follows:

Part 1 - Practice and Procedure

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.785 (a) is revised to read as follows:

§1.785 Annual financial reports.

(a) An annual financial report shall be filed by telephone carriers and affiliates as required by Part 43 of this chapter on Form M.

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3. Sections 1.793 and 1.794 are removed.

4. Part 34 is removed in its entirety.

5. Part 35 is removed in its entirety.

Part 43 - Reports of Communications Common Carriers and Certain Affiliates

6. The authority citation for Part 43 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

7. Paragraphs (a) and (d) of Section 43.21 are revised to read as follows:

§43.21 Annual reports of carriers and certain affiliates.

(a) Communication common carriers having annual operating revenues in excess of $100 million, and certain companies (as indicated in paragraph (c) of this section) directly or indirectly controlling such carriers shall file with the Commission annual reports or an annual letter as provided in this section. Except as provided in paragraphs (c), (e) and (f) of this section, each annual report required by this section shall be filed not later than March 31 of each year, covering the preceding calendar year. It shall be filed on the appropriate report form prescribed by the Commission (see §1.785 of this chapter) and shall contain full and specific answers to all questions propounded and information requested in the currently effective report forms. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible accounting officer. A copy of each annual report shall be as retained in the principal office of the respondent and shall be filed in such manner to be readily available for reference and inspection.

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(d) Each miscellaneous common carrier (as defined by §21.1 of this chapter) with operating revenues over $100 million for a calendar year shall file with the Common Carrier Bureau Chief a letter showing its operating revenues for that year and the value of its total communications plant at the end of that year. Each record carrier with operating revenues over $75 million for a calendar year shall file a letter showing selected income statement and balance sheet items for that year with the Common Carrier Bureau Chief. These letters must be filed by March 31 of the following year.

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Appendix B

Income Statement
For the 12 months ending December 31, 19XX

Revenues:		
Exchange Telex Services	$_____	
Message Telegraph Services	_____	
Private Line Services	_____	
Other Revenues	_____	
Total Revenues		$_____
Expenses:		
Operating Expenses	$_____	
Depreciation and Amortization	_____	
Taxes other than Income Taxes	_____	
Interest Expense	_____	
Other Income and Expenses, net	_____	
Income Taxes	_____	
Total Expenses		_____
Income before Extraordinary Items		_____
Extraordiary Items (Net of Tax of $_____)		_____
Net Income		$_____

Balance Sheet
As of December 31, 19XX

Assets:		
Current Assets	$_____	
Investments and Funds	_____	
Property, Plant and Equipment	_____	
Less Accumulated Depreciation	_____	
Net Property, Plant and Equipment	_____	
Other Assets and Deferred Charges	_____	
Total Assets		$_____
Liabilities and Owners' Equity:		
Current Liabilities	$_____	
Long Term Debt	_____	
Deferred Credits	_____	
Total Liabilities	_____	
Owners' Equity	_____	
Total Liabilities and Owners' Equity		$_____

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

J.C. Maxwell
Broadcasting Group, Inc.,

Licensee of Noncommercial
Radio Station WMPR(FM),
Jackson, MS,

Petition for Reconsideration
of Forfeiture Order

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1993; Released: June 28, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $7,500 Forfeiture Order issued February 5, 1993,[1] to J.C. Maxwell Broadcasting Group, Inc., licensee of Noncommercial Radio Station WMPR(FM), Jackson, MS, and (2) the licensee's response dated February 10, 1993, asking that the forfeiture be rescinded or, in the alternative, that permission be granted to pay the forfeiture in installments.

2. The Forfeiture Order, and preceding Notice of Apparent Liability,[2] were issued for repeated violations of Section 399B of the Communications Act of 1934, as amended, which prohibits noncommercial stations such as WMPR from broadcasting advertisements. 47 U.S.C. § 399b. *See also* 47 C.F.R. § 73.503. As the licensee has raised no new arguments or mitigating circumstances, we see no reason to revisit the issues.

3. Accordingly, we DENY the licensee's request for a rescission of the forfeiture. J.C. Maxwell Broadcasting Group, Inc., licensee of Radio Station WMPR(FM), Jackson, MS, IS ORDERED TO FORFEIT to the United States the sum of seven thousand five hundred dollars ($7,500) for repeated violations of 47 U.S.C. § 399b. Payment of the forfeiture in installments will be considered as a separate matter in accordance with Section 1.1914 of the Commission's rules.

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[1] *See J.C. Maxwell Broadcasting Group, Inc.*, 8 FCC Rcd 784 (MMB 1993).
[2] *See J.C. Maxwell Broadcasting Group, Inc.*, 7 FCC Rcd 3218 (MMB 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of CanXus Broadcasting Corporation, Licensee of Radio Station WCXU-FM, Caribou, Maine

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1993; Released: June 28, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Memorandum Opinion and Order released on June 16, 1992, affirming a Notice of Apparent Liability for a Forfeiture of $10,000 against CanXus Broadcasting Corporation, licensee of Radio Station WCXU-FM, Caribou, Maine; and (2) the licensee's Petition for Reconsideration of the Forfeiture Order dated June 28, 1992.

2. The Forfeiture Order and NAL were issued for CanXus' apparent violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules in connection with CanXus' apparent unauthorized assumption of control over Station WKZX-AM, Presque Isle, Maine. The facts are set forth in full detail in the Forfeiture Order and NAL and will not be repeated here.

3. In addition to reiterating arguments already disposed of in the Forfeiture Order, CanXus argues the following: (1) that its agreements with Colonial Broadcasting, the licensee of Station WKZX-AM, Presque Isle, Maine, constituted a permissible time brokerage agreement similar to others approved by the Commission; (2) that the NAL and Forfeiture Order are barred by the statute of limitations; and (3) that the Commission failed to consider the financial and economic documentation submitted by CanXus in support of its asserted inability to pay the forfeiture.

4. CanXus first asserts that its programming and financial agreements with Colonial Broadcasting, the licensee of WKZX-AM, were indistinguishable from local marketing or time brokerage agreements that the Commission has approved through declaratory rulings. In particular, CanXus compares its agreements with Colonial to the time brokerage agreement approved in *Letter to Brian Madden, Esquire Re: M. Belmont VerStandig, Inc. and Stonewall Broadcasting Company*, 6 FCC Rcd 1871 (M. Med. Bur. 1991). There are some similarities between the agreements. Both agreements involved substantial amounts of simulcasting and joint sales of advertising. There are, however, also significant differences between these agreements. Whereas Stonewall Broadcasting retained some of its own staff under its agreement, Colonial terminated virtually all of its staff. Furthermore, although the Stonewall agreement provided for joint sales, it did not provide for a blending of all financial operations to the point where each station's finances were indistinguishable as a practical matter. In contrast, CanXus' agreements with Colonial explicitly provided for a substantial assumption of financial control by CanXus over advertising revenues, business expenses, contractual obligations, and salaries. In implementing its agreements with Colonial as discussed in the NAL and Forfeiture Order, CanXus negated any safeguards that may have existed in the written agreements by substantially co-mingling accounts receivable, checking accounts, and accounts payable. This factor highlights the important distinction between the way an agreement is drafted and the way it is implemented. In CanXus' case, although some of the wording of its agreements with Colonial may have resembled other agreements approved by the Commission, much of the implementation exceeded the permissible limits for such agreements. Accordingly, we reject CanXus' analogy to other time brokerage agreements approved by the Commission.

5. CanXus also asserts that the Commission's enforcement action against WCXU is barred by the statute of limitations set forth in 47 U.S.C. Section 503(b)(6). We disagree. CanXus's involvement in the operations of Station WKZX began in August 1987, and apparently ended sometime between April and October of 1989. The NAL against WCXU was issued in September 1991. The initial license to cover the construction permit of WCXU was granted in October 1991. Accordingly, under the statute of limitations in effect in September 1991,[1] since the license had not yet been granted and, consequently was not renewed between the violation and the issuance of the NAL, the Commission had authority to issue an NAL for a period of up to three years after the violation ceased in October 1989, i.e. until October 1992. Accordingly, the three year statute of limitations period applied and the NAL was timely issued.

6. CanXus further argues that the Commission failed to properly consider the information submitted by CanXus in support of its asserted inability to pay the forfeiture. Among the documentation submitted with its response to the NAL was a videotape depicting Canxus' daily routines and hardships, information describing the difficult economic conditions in Maine, and a balance sheet, statement of income and related earnings, and statement of cash flows for the first eight months of 1991. The Commission did consider all this documentation in the Forfeiture Order. As we noted, however, the economic conditions in Maine and in various segments of the broadcast industry are unfortunate, but the financial status of CanXus itself is ultimately the relevant factor. Although the Forfeiture Order men-

[1] Congress recently amended Section 503(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b)(6), to extend the statute of limitations for issuing forfeitures to broadcast station licensees. The amendment extended the statute of limitations to encompass the entire license term and clarified the meaning of the term "current license term." Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80(c)(1), has been amended to reflect this statutory change. This change in the statute of limitations does not affect the outcome of the instant case, since the NAL was issued under the previous statute of limitations.

tioned only the "balance sheet," the statement of income and related earnings and statement of cash flow were also considered. Contrary to CanXus' assertion that these documents were "prepared in accordance with generally accepted accounting principles," the CPA who prepared the statements stated that the documents were unaudited and that "Due to time and financial constraints, management has found it necessary to omit substantially all of the disclosures required by generally accepted accounting principles... If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows." Letter of Cheryle Levesque, CPA, dated November 21, 1991. Accordingly, the financial documents submitted by CanXus do not comply with the requirements set forth in the attachment to the NAL. Furthermore, contrary to CanXus' assertion that it has a spotless record in the eyes of the Commission, CanXus violated Section 73.1125 of the Commission's Rules by failing to maintain a meaningful management and staff presence at the main studio at its WCXX-FM facility in Madawaska, Maine between July 1990 and June 1992.

7. Notwithstanding the above discussion, it appears that the violation by CanXus was minor when viewed in the context in which it occurred, and that it resulted primarily from inadvertent mistakes committed while attempting to save a station in severe financial distress. Therefore, in light of the circumstances of this case, the Commission, on its own motion, will reduce the amount of the forfeiture imposed on CanXus to $1,000.

8. Accordingly, CanXus' Petition for Reconsideration of the Forfeiture Order IS GRANTED to the extent set forth herein and, in all other respects, IS DENIED. IT IS ORDERED that CanXus Broadcasting Corporation, licensee of Radio Station WCXU-FM, Caribou, Maine, FORFEIT to the United States the sum of One Thousand Dollars ($1,000) for the violation of 47 U.S.C. Section 310(d) and 47 C.F.R. Section 73.3540. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.115 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

NEW YORK
TELEPHONE COMPANY

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain, facilities and equipment to test video dialtone service in portions of New York City

ORDER AND AUTHORIZATION

Adopted: June 7, 1993; Released: June 29, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application filed by New York Telephone Company ("NYT") pursuant to Section 214 of the Communications Act of 1934, as amended,[1] and Section 63.54 of the Commission's rules, as amended by the Commission's *Second Report and Order*.[2] NYT's application seeks authority to conduct a limited video dialtone trial to test technologies for the development of a video dialtone platform.[3] Specifically, NYT seeks to test transmission technologies, switching technologies, methods of storing video programming, and methods of delivering video signals to end users.

2. NYT's application is opposed by Time Warner Cable ("Time Warner"), Cablevision Systems Corporation ("Cablevision"), and New York City Department of Telecommunications and Energy ("City of New York"). In addition, the New York State Department of Public Service ("NYDPS") filed a protest to any action by the Commission that may infringe on the authority of NYDPS in connection with intrastate communications. Responsive pleadings were filed by NYT, Liberty Cable, Time Warner, Cablevision, and the City of New York. On April 6, 1993, the Commission submitted a list of questions to NYT regarding its Section 214 application. On April 12, 1993, NYT submitted its responses [herein "NYT Answers"] and served a copy on all parties to this proceeding. Time Warner filed comments on NYT's Answers on May 4, 1993 [herein "Time Warner Response"].

3. For the reasons set forth herein, we grant the application of NYT subject to several conditions.

II. BACKGROUND

4. In the *Second Report and Order*, the Commission determined that, through video dialtone, local telephone companies could participate in the video marketplace, consistent with the statutory telephone company-cable television cross-ownership restrictions.[4] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[5]

5. In its application, NYT requests authority to conduct a video dialtone trial using fiber optic facilities, along with video switching capabilities, to deliver video signals to three apartment buildings in Manhattan.[6] NYT states that the trial will test new technologies and allow NYT to use what it learns to develop a video dialtone service.[7] Initially, NYT states that it will employ analog technology to deliver video programming to end users, and as new digital technology, such as an asynchronous transfer mode (ATM) switch, compact disk-read only memory (CD-ROM), and digital storage, becomes available, it will be integrated into the network.[8] NYT states that its trial is consistent with the

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[1] 47 U.S.C. § 214.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Second Report and Order); pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company, et al v. FCC and USA*, (and consolidated cases) (No. 92-1404), (D.C. Cir. Sept. 9, 1992), *Alliance for Communications Democracy v. FCC*, (No. 92-1578) (D.C. Cir. Nov. 6, 1992).

[3] "Video dialtone" is defined as the provision by a local exchange telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. A "basic platform" is a common carriage transmission service coupled with the means by which customers can access any or all video programming. If a local exchange company provides such a basic platform, it is permitted to provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. *Second Report and Order*, 7 FCC Rcd at 5783.

[4] *Second Report and Order*, 7 FCC Rcd at 5783.

[5] *Id.* at 5820. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. A "line" includes any channel of communication established by appropriate equipment. 47 U.S.C. § 214(a).

[6] The network configuration of NYT's proposed trial consists of a video dialtone platform located at NYT's East 56th Street Central Office, fiber facilities connecting video programmers to the platform, and associated equipment. End users will be located at three multi-dwelling unit (MDU) buildings (Normandie Court, Bristol Plaza, and Windsor Court) in Manhattan. NYT will use existing fiber or lay new fiber from its Central Office to a demarcation point within the MDU buildings served during the trial. Liberty Cable's existing coaxial cable drops will be used to connect end users within the MDU buildings to NYT's demarcation point. NYT Application at 5-6; NYT Answers at 4.

[7] NYT Application at 3.

[8] NYT Answers at 1. NYT states that its trial is experimental even though it will be initially based on analog technology. NYT states that it will develop and test multi-channel AM video transport services, switched video services, billing and collection for programming provided over its network, and the storage and forwarding of video programming. NYT Opposition at 6, note 14. According to NYT, it hopes to gain knowledge that will help it define and support new video transport, switching and storage services. NYT Answers at 3.

requirements of video dialtone in that it will provide a basic platform that is capable of serving multiple video programmers on a non-discriminatory basis.[9]

6. NYT states that video programming will be provided by unaffiliated video programmers, including Liberty Cable, a non-franchised Satellite Master Antenna TV (SMATV) provider that currently provides SMATV service to the residents of the three MDU apartment buildings to be served during the trial.[10] NYT states that it will provide video programmers with three ways to access the basic platform: 1) video programmers will be able to access the basic platform directly at the 56th Street central office using a baseband, single channel facility (direct access); 2) video programmers will be able to access a port on the video switch using a baseband, single channel facility (switched access); and 3) video programmers will be able to deliver stored programming to NYT, or in the alternative, NYT will record programming into storage from a baseband, single channel facility (storage access).[11] NYT states that it will provide all video programmers non-discriminatory access to each access method, and will make available a video storage server to all video programmers on an open and non-discriminatory basis.[12] NYT further states that all programmers will be able to use Liberty Cable's coaxial drops to distribute their programming from NYT's demarcation point to the end users, that Liberty has guaranteed other programmers access, and that if end users do not receive all programming that is available, "NYT would take all necessary steps to rectify the situation."[13] NYT states that all end users will be able to receive the programming offered by video programmers using the direct access method, and that, initially, 50 end users will be able to access switched video services.[14] NYT states that it will expand the number of customers having access to switched video services as the trial progresses.[15]

7. NYT states that the system has been planned with sufficient capacity to accommodate multiple video programmers and it does not anticipate that there will be a shortage of facilities for the trial.[16] NYT states that it will accommodate video programmers on a first-come, first-served basis, and if necessary, will undertake reasonable expansion of the initial trial system.[17] According to NYT, capacity will not be an issue as digital technology is introduced.[18]

8. NYT also states that it may provide enhanced and non-common carrier services, such as a video store-and-forward service and a video gateway.[19] NYT states that it will not charge video programmers or end users for their participation in the trial, but the decision to charge end users for the video programming will be left to each video programmer.[20] The trial is scheduled to last for one year.[21]

III. DISCUSSION

A. Provision of Video Dialtone Service

Comments

9. In its petition to deny NYT's application, Time Warner contends that NYT's proposal does not qualify as video dialtone, but instead takes on the character of a private or non-common carrier offering because the proposed basic platform is tailored to the special requirements of Liberty Cable.[22] Time Warner states that NYT actually is proposing "fiber to the curb", instead of extending video dialtone facilities to end users, and that because Liberty controls access to the MDU buildings' inside wiring, Liberty could act as the gatekeeper preventing other programmers from reaching the residents in the buildings.[23] Time Warner also questions the capacity of NYT's platform,[24] and specifically, the capacity of the coaxial drops to transport 160 analog video channels.[25] In addition, Time Warner questions whether video programmers, other than Liberty Cable, will be allowed to broadcast multichannels

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[9] NYT Opposition at 5; NYT Answers at 3.

[10] NYT Application at 2-3. According to NYT, it also is discussing access to the platform with a number of other video programmers including providers of movies-on-demand, newspaper services, financial services, travel information and home shopping. NYT Answers at 5.

[11] NYT Answers at 2, 4. According to NYT, the direct access method essentially provides the video programmer with a broadcast capability, and the switched access method enables the video programmer to offer on-demand services either "live" or through stored programming from the video programmer's storage facility. *Id.* at 1-2.

[12] *Id.* at 2.

[13] *Id.* at 3; *see also* Liberty Cable's letter dated April 30, 1993 in which Liberty assures the Commission that during the video dialtone test, Liberty will not charge NYT, or any video programmer, to access the facilities owned by Liberty and used by Liberty to deliver video programming to individual housing units.

[14] *Id.* at 5.

[15] *Id.*

[16] *Id.* at 5-6. NYT identifies the capacity limitations in terms of the components making up the video dialtone trial platform. According to NYT, initially, the fiber network will be capable of transmitting up to 280 signals, the coaxial drops will be capable of providing 160 channels, and the video switch will be capable of 160 input ports and 90 output ports.

[17] *Id.* at 6-7.

[18] *Id.* at 6. NYT states that it will expand the basic platform during the one year trial as quickly as the development of digital technology will allow. According to NYT, during the trial, it will migrate to ATM switching, digital compression and digital transport techniques.

[19] NYT Application at 2, 10. NYT states that it will retain one channel to develop and test a gateway directory for video dialtone service.

[20] *Id.* at 3; NYT Answers at 5.

[21] NYT Application at 3.

[22] Time Warner Comments at 5. Time Warner states that NYT's offering does not rise to the level of common carrier channel service, and that even if the service could be considered common carrier channel service, the lack of a common carrier platform in NYT's proposal clearly removes the proposal from consideration as a video dialtone service. *Id.* at 8. *See also* City of New York Petition at 3. The City of New York contends that NYT is attempting to provide channel service under the guise of providing video dialtone.

[23] *Id.* at 11. *See also* Time Warner Response at 4. ("Unless NYT is required to construct its video dialtone 'platform' all the way to the premises of each individual resident in each building, Liberty is in a position to thwart competition from other program providers...")

[24] Time Warner Response at 2-3. In reference to NYT increasing its initial capacity from 90 channels in its Application to 120 channels in its Opposition to 160 channels in its Answers, Time Warner contends that NYT will say anything in order to try to meet the minimum requirements of video dialtone.

[25] *Id.* at 8-9.

of video programming to end users.[26] Cablevision states that NYT should fully describe the terms and conditions under which access to the platform will be provided to other programmers.[27]

10. The City of New York contends that the structure of NYT's proposed offering raises substantial discrimination concerns, not only with regard to capacity, but also because NYT has chosen the routes and locations for the service and, therefore, the potential customers.[28] The City of New York is most concerned that NYT's failure to provide end-to-end service will result in discrimination to programmers other than Liberty.[29]

11. NYDPS objects to any Commission action preempting state authority over intrastate services and also raises broader questions about the Commission's jurisdictional analysis in the *Second Report and Order*. [30]

Discussion

12. We conclude that the public convenience and necessity would be served by granting Section 214 authority for this limited technology trial, subject to the conditions outlined below. Although some parties have argued that NYT's video dialtone experimental proposal does not set forth with specificity all parameters of the service offering, we conclude that a limited technical trial like this one is not susceptible to the same level of precision as an actual service offering.[31] Furthermore, technology trials assist us to meet our mandate under the Communications Act to encourage technological innovation in communications and to expedite the introduction of new technology, subject to other public interest considerations.[32] More specifically, in the *Second Report and Order*, we found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill our goal of promoting an advanced, cost-effective telecommunications infrastructure.[33] In *Chesapeake and Potomac Telephone Co. of Virginia (C&P)*,[34] we granted Section 214 authorization for a trial to test a new technology that may be capable of delivering video dialtone service over copper-loop facilities. We believe that the public convenience and necessity would be served by NYT's limited technical trial subject to the conditions imposed, and also that the rationale underlying the *C&P* decision supports authorization in this case.

13. As was the case in *C&P*, we find NYT's video dialtone technology trial will further the public interest goals identified by the Commission in the *Second Report and Order* including: 1) investment in an advanced telecommunications infrastructure; 2) competition in the provision of video services; and 3) additional opportunities for consumer choice through a diversity of video services.[35] NYT's technology trial will further these goals and could be an important precursor to the development of an advanced telecommunications infrastructure and the broader offering of a video dialtone service. Initially, NYT proposes to test the provision of switched and non-switched video services over analog facilities, and as the trial progresses, to incorporate digital technology into the network, such as an ATM switch, CD-ROM and digital storage. We will impose conditions on the grant of this application to ensure the effectiveness of the test in serving the goals identified herein and to ensure NYT's compliance with our video dialtone rules and with the terms of this authorization. Furthermore, NYT will be required to file a report, six months after commencement of the trial and at the end of the trial, on: 1) the inquiries made concerning access to the platform and NYT's actions taken on these inquiries; 2) the services offered by video programmers, the identity of the video programmers accessing NYT's platform and the number of channels used by each programmer; 3) the accessibility by end users to the video programmers; 4) the impact of incorporating digital technology into the network; and 5) other matters that will permit us to evaluate NYT's compliance with the grant and to determine the impact of the test on the public policy goals we have discussed above, *see* para. 28, *supra*.

14. Most importantly, we find that, as conditionally granted, NYT's proposal meets the requirements for the provision of a limited video dialtone technical trial.[36] The video dialtone framework requires local telephone companies offering video dialtone to make available to multiple video programmers, on a non-discriminatory basis, a basic common carrier platform for the delivery of video programming and other services to end users. By providing this basic platform, local telephone companies are permitted to exceed the "carrier-user relationship" with video programmers that are customers of, interconnect with, or share the construction and/or operation of, the basic common carrier platform.[37] A local telephone company may not, however, own or control video programming or determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering or the price, terms, and conditions of video programming offered to consumers.[38] In developing

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[26] *Id.* at 11.

[27] Cablevision Petition at 11. Cablevision states that while NYT's basic platform may be constructed with capacity to serve multiple programmers, there is no assurance that it will be operated so that this capacity is actually available to multiple programmers.

[28] City of New York Reply at 5.

[29] *Id.*

[30] NYDPS Comments at 1.

[31] We emphasize, however, that in the context of reviewing actual, permanent video dialtone service offerings, a greater level of specificity is required.

[32] Section 7 of the Communications Act of 1934, as amended, 47 U.S.C. § 157.

[33] *Second Report and Order*, 7 FCC Rcd at 5836.

[34] FCC 93-160, released March 25, 1993.

[35] *Second Report and Order*, 7 FCC Rcd at 5787.

[36] Based on NYT meeting the requirements for the provision of a video dialtone trial, a local franchise is not required by NYT or Liberty Cable. *See* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, (*First Report and Order*), 7 FCC Rcd 300, 324-327 (1991). Furthermore, we find that the recent Supreme Court decision in *Beach Communications* does not affect our finding that a local franchise is not required by Liberty Cable for this video dialtone trial. *FCC et al. v. Beach Communications, Inc. et al.*, No. 92-603 (U.S. June 1, 1993).

[37] Generally, local exchange carriers providing facilities for the transmission of video programming within their telephone service areas are prohibited from entering into relationships with video programmers except "carrier-user" relationships, which encompass only communications services and functions provided on a common carrier basis. 47 C.F.R. § 63.54; *Second Report and Order*, 7 FCC Rcd at 5787, note 18.

[38] *Second Report and Order*, 7 FCC Rcd at 5797-98.

this regulatory framework, the Commission purposely chose to rely upon the marketplace and technology to dictate the development of video dialtone.[39]

15. Our decision to grant NYT conditional 214 authority to offer a one year video dialtone experiment is based on NYT offering adequate capacity to serve multiple video programmers, offering non-discriminatory access to the platform, and its lack of ownership, control or decision-making ability concerning the presentation of video programming to consumers. First, we find that NYT will be offering sufficient capacity to serve multiple video programmers. According to NYT, initially there will be capacity to provide 160 channels of video programming,[40] of which Liberty Cable will be assigned 70 channels.[41] NYT states that it will accommodate all requests by video programmers on a first-come, first-served basis.[42] Furthermore, NYT states that it does not anticipate capacity problems, particularly as digital technology is introduced during the trial, but that it is prepared to expand capacity to meet all reasonable requests for access.[43] To ensure NYT complies with this commitment, we will condition this authorization on NYT having the capacity to serve multiple video programmers on a non-discriminatory basis, and on its ability and willingness to undertake reasonable expansion of capacity as necessary.

16. Second, we find that NYT will provide video programmers non-discriminatory access to the platform and will provide end users non-discriminatory access to video programmers. Full and fair access to the platform, and to end users, by multiple programmers is an essential feature of video dialtone. NYT states that it will not impose any facilities or equipment charge on video programmers to connect to the basic platform during the trial.[44] In addition, NYT states that it will provide non-discriminatory access to all video programmers by offering a variety of access choices, each available to all interested video programmers,[45] and that a video storage server will be available, at no charge, to all video programmers on an open and non-discriminatory basis.[46] Under these circumstances, we find that all video programmers will receive access to the basic platform under the same terms and conditions, and that a prior agreement with Liberty is not a basis to prohibit this technology trial, unless Liberty receives access to the platform under different terms and conditions than other video programmers. We will, however, condition this grant on NYT's providing all video programmers access to the basic platform under the same terms and conditions.

17. One element of a non-discriminatory platform is the ability of end users to have access to all video programming offered over the platform. According to NYT, channels of basic programming offered by Liberty Cable and other video programmers using the direct access method will be available to all existing and future customers.[47] Furthermore, NYT states that it will provide 50 end users, that have access to basic programming, access to every switched video service offered over the platform.[48] We will condition this grant on NYT's providing end users access to all of the basic programming offered over the platform by video programmers, and on NYT's providing those end users that have access to switched video services, access to all video programmers on the platform providing switched video services. We will also require NYT to inform all end users of their rights in terms of access to all basic programming and switched video services offered over the platform.

18. We further find that NYT's use of Liberty Cable's coaxial drops to provide end-to-end video dialtone service is an acceptable means of complying with the Commission's video dialtone rules during this one year trial. NYT and Liberty Cable both state that for the duration of the trial, Liberty Cable has guaranteed that all video programmers will have access to the coaxial facilities installed to each apartment at the trial sites at no charge.[49] Consistent with NYT's and Liberty's representations, we will require NYT to ensure that video programmers have access to all end users and that the coaxial drops of Liberty Cable are not used in a discriminatory manner. We recognize that there is some concern about the potential ability of video programmers to gain access to the buildings included in this trial. *See* Liberty Cable Comments; Time Warner Comments at 17-23. While this concern is speculative, in order to assess whether NYT is complying with its non-discrimination commitment, we will require that reports on the trial filed by NYT include a discussion on how access by

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[39] *Id.* at 5812.

[40] With digital transport, NYT asserts that capacity will increase to 500 channels. NYT Answers at 6.

[41] NYT Opposition at 6.

[42] NYT Answers at 6. We will require NYT to file reports from programmers to evaluate whether any programmer believes it has been discriminated against based upon NYT's allocation of capacity and channel assignments on a first-come, first-served basis, *see* para. 28(i)(1), *supra*.

[43] *Id.* at 6-7.

[44] NYT Answers at 4.

[45] *Id.* at 3. As already noted, NYT states that all three methods of accessing the basic platform -- direct access, switched access, and storage access -- will be available to all video programmers. *Id.* at 7. NYT has filed an illustrative tariff with its Section 214 application that outlines the terms and conditions of access by video programmers.

[46] *Id.* at 2. NYT further states that video programmers will be able to connect their own video storage server to the basic platform using the switched access method.

[47] *Id.* at 5.

[48] *Id.* at 5-6. NYT states that the analog switch has 90 output ports and 160 input ports, and that access to switched video services is limited to 50 end users initially, but that NYT plans to expand the number of end users with access to switched video services as the trial progresses. According to NYT, end users will be able to access 40 channels of switched video services at each of the three end user locations; however, NYT states that it plans to expand the capacity of the analog switch to 80 channels so long as the signal quality remains acceptable.

[49] *Id.* at 3. Liberty Cable states in a letter to the Commission dated April 30, 1993 that its facilities will be used to deliver video programming and interactive signals between NYT's demarcation point and individual housing units. Liberty states that during the video dialtone test, Liberty will not charge NYT, or any video programmer, to access the facilities owned by Liberty and used by Liberty to deliver video programming or interactive signals to or from individual housing units within the buildings in which the video dialtone test is being conducted. We believe that the representations by Liberty and NYT, together with the conditions placed on NYT to provide video programmers non-discriminatory access to the coaxial drops, address concerns regarding "open access to all video programmers", *see* Time Warner Reply at 11, and "end-to-end service", *see* New York City Reply at 5.

programmers to end users was accomplished. One of the purposes of video dialtone service is to provide end users with access to multiple video programmers. NYT's video dialtone platform has the potential to open end users' access to video programmers and should eliminate "Liberty's position as the only provider of multi-channel video programming to residents of these MDU complexes." *See* Time Warner Petition at 23.

19. Finally, we find that NYT's proposal does not represent an impermissible involvement by NYT in how programming is presented to end users.[50] While NYT 2 has determined that it will not charge programmers or end users for the transport of video programming, it has left to the video programmers to decide whether to charge end users for the programming offered during the trial.[51] As in *C&P*, we will condition the grant of this application on NYT's allowing video programmers to decide whether they will charge end users for video programming offered during the trial.

20. In the *Second Report and Order*, we determined that the basic video dialtone platform is presumptively an interstate service over which the Commission has exclusive jurisdiction.[52] NYDPS has provided no facts to rebut that presumption in the context of this case. As to its broader concerns regarding the jurisdictional analysis in the *Second Report and Order*, we will address those matters in connection with the petitions for reconsideration filed by NYDPS and others.

B. Allocation of Costs

Comments

21. NYDPS contends that NYT fails to provide adequate information to determine how the costs associated with the trial will be treated. Specifically, NYDPS states that it is unclear how NYT proposes to segregate trial costs into separate subaccounts under Part 32 of the Commission's rules, and how the regulated costs of the trial will be treated for separations purposes.[53] Furthermore, NYDPS states that NYT does not explain how it intends to recover the costs of the trial in the absence of charges to Liberty or others that may participate in the trial.[54] Time Warner contends that NYT fails to propose a workable mechanism for the allocation of costs among the various regulated and unregulated services that might be transported over its facilities.[55] Cablevision alleges that unless NYT is required to provide a full explanation of its cost allocation procedures, there will be no opportunity to ensure that NYT's telephone ratepayers do not subsidize the video dialtone basic platform.[56]

22. In opposition, NYT states that the costs for enhanced services, *e.g.*, video gateway and store-and-forward capability, will be assigned to nonregulated accounts pursuant to Part 64 and NYT's approved Cost Allocation Manual. NYT states that the costs of the regulated basic platform will be assigned as appropriate under Part 32.[57] In its reply, Time Warner contends that without charging Liberty for its video dialtone offering, NYT's allocation of costs is meaningless. Time Warner and Cablevision state that without NYT's explaining how it intends to apply the cost allocation rules to the proposed facilities, there is no opportunity to evaluate whether existing rules will be applied in a manner that adequately protects ratepayers and prevents anticompetitive conduct.[58] In addition, Time Warner contends that NYT fails to address the obvious complexities of allocating costs arising from mixed telephonic and video use, as well as mixed regulated and unregulated use, of the same facilities.[59] NYT states that the facilities used during the trial will be dedicated to the video dialtone trial, and that all costs will be identified and assigned directly to the trial.[60]

Discussion

23. We find that NYT's assignment of costs related to the provision of the basic platform in accordance with Part 32 is appropriate for this experiment.[61] As was the case in *C&P, supra*, the trial is limited and involves relatively small costs. However, to ensure that these costs are not borne by ratepayers of other regulated services, we will require NYT to segregate all costs incurred in providing the basic platform into subsidiary accounting records.[62] We agree with the NYDPS that by segregating all video dialtone costs into subsidiary accounting records, trial costs will be readily identifiable. NYT states that the fiber facilities used to provide video dialtone trial service will not be used to provide telephone exchange service.[63] Therefore, the issue of jurisdictional separations for mixed telephone and video services is not before us. We will require, however, that NYT directly assign all costs related to the provision of the video dialtone trial, including the fiber facilities and equipment costs. If these costs are not recovered from future video dialtone services, they must be borne by shareholders rather than the ratepayers of other regulated services.

24. NYT states that it will account for the costs of providing unregulated video dialtone services in accordance with Part 64 of the Commission's rules and NYT's approved Cost Allocation Manual.[64] To the extent that the nonregulated components of the video dialtone trial are not already covered by NYT's cost allocation manual, NYT

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[50] Local telephone companies are prohibited from owning, controlling or making decisions about how video programming is presented for sale to consumers, including making decisions concerning the bundling or tiering, or the price, terms and conditions of video programming offered to consumers. *Second Report and Order*, 7 FCC Rcd at 5789.

[51] NYT Answers at 5.

[52] *Second Report and Order*, 7 FCC Rcd at 5820.

[53] NYDPS Comments at 4.

[54] *Id.* at 5.

[55] Time Warner Comments at 29.

[56] Cablevision Comments at 8.

[57] NYT Opposition at 9.

[58] Cablevision Reply at 3; Time Warner Reply at 14.

[59] Time Warner Reply at 15.

[60] NYT Answers at 7.

[61] In determining an appropriate accounting method for the costs of providing the basic platform, we are guided by the principles that all video dialtone costs should be assigned to the video dialtone trial and that ratepayers of other regulated services may not be subjected to unjust and unreasonable rates.

[62] NYT must account for all its costs associated with the trial, including development costs and expenses, in accordance with Part 32 and Section 64.901 of the Commission's rules.

[63] NYT Answers at 7.

[64] NYT Opposition at 9.

will have to revise its manual to show the procedures it intends to use to allocate the costs of nonregulated components of video dialtone services to nonregulated activities for the duration of the trial.[65] Until these revisions, as necessary, are filed with the Commission, NYT cannot begin to offer enhanced services. These temporary revisions will be subject to public comment and Commission scrutiny. NYT will have to file permanent revisions, as necessary, if and when it decides, and is authorized, to offer video dialtone services generally. Our decision on any temporary revisions will not finally resolve any issue with regard to video dialtone services.

25. In the context of NYT's limited technology trial, we believe that our existing safeguards, coupled with the conditions we impose, including a requirement that NYT offer non-discriminatory access to the basic platform, adequately protect against anticompetitive conduct by NYT. Among these safeguards are the cost allocation rules and cost accounting safeguards designed to separate nonregulated service costs from regulated service costs,[66] our ONA policy, which we believe effectively ensures that independent enhanced service providers can obtain non-discriminatory access to basic services,[67] and our non-discrimination reporting requirements, and network disclosure rules.[68] We are not persuaded, and the commenters have not shown, that these safeguards are inadequate to protect against cross-subsidization and discrimination by NYT.

C. Conclusion

26. We find that the grant of NYT's application for a limited technical trial, as conditioned, will serve the public convenience and necessity because it should promote the Commission's stated video dialtone goals and also provide valuable information regarding the potential for video dialtone services. We recognize that concerns have been raised over the evolving nature of NYT's application[69] and the lack of specificity of NYT's proposal;[70] however, we find that a trial, by definition, is not generally susceptible to the same level of precision as an actual offering. We emphasize, however, that the Commission expects a greater level of specificity in applications for actual service offerings, as opposed to trials. If it comes to our attention that this trial is not progressing in compliance with this order (for example, if video programmers suffer discrimination from either NYT or Liberty), we will take appropriate action, which could include halting the trial or assessing forfeitures.

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of New York Telephone Company (File No. WPC-6836) IS GRANTED, and the applicant is authorized to provide a video dialtone trial in its Manhattan service area for a period of one year, commencing from the date service is available to end users.

28. IT IS FURTHER ORDERED, that grant of this application IS SUBJECT TO the following conditions:

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any NYT rate base or as a regulated expense without prior authorization from this Commission.

b) That NYT not involve itself in decisions involving the presentation of video programming to end users. NYT must allow video programmers participating in the trial to decide whether they will charge for video programming offered to end users. NYT must not discriminate against video programmers based upon their decision to charge or not to charge for the programming offered during the trial.

c) That the trial length shall be for the period of one year from the date service is available to end users.

d) That NYT shall file any necessary revisions to its Cost Allocation Manual (CAM) prior to providing any enhanced services.

e) That NYT provide all video programmers access to the basic platform under the same terms and conditions and undertake all reasonable steps to expand capacity as necessary to meet demand.

f) That NYT charge no video programmers for the facilities and equipment necessary to connect their programming to the platform, if any one programmer is not charged.

g) That NYT not discriminate against video programmers regarding methods of accessing the platform and testing of technologies. That NYT ensure that end users having access to any switched video services have access to all switched video services, and that all end users have access to all basic programming. We will require NYT to inform all end users of their rights governing access to all basic programming and switched video services offered over the platform.

i) That NYT ensure that any other party that owns, controls, or operates facilities that are used to deliver video dialtone service to end users provide video programmers non-discriminatory access consistent with conditions (e) through (h) above.

j) That NYT submit to the Chief, Domestic Services Branch, Common Carrier Bureau, six months after commencement of the trial and at the end of the one year trial period, a written report. The reports shall, among other things,

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[65] *See* Section 64.903 of the Commission's rules.

[66] Separation of Costs of Regulated Telephone Service Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987), (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom., Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[67] Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991), (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending, California v. FCC*, (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with *MCI v. FCC* (No. 921-70186), *NY v. FCC* (No.92-70217), *ANPA v. FCC* (No. 92-70261); *California v. FCC* (9th Cir. Feb. 21, 1992) (No. 92-70105), consolidated on June 2, 1992 with *NYPSC v. FCC* (No. 92-70281).

[68] *BOC Safeguards Order*, 6 FCC Rcd at 7601-14.

[69] Time Warner Response at 2-3.

[70] Time Warner Response at 2, 5, 12 and 14.

1) include a statement from each programmer using NYT's services whether that programmer believes it has been discriminated against by NYT in terms of signal quality, access to end users, channel capacity, channel assignments or in any other manner. In addition, NYT shall provide a statement from each programmer, or from NYT concerning each programmer, that inquired about attaining access to NYT's platform, and did not attain access, and why it did not.

2) include a response from NYT to each programmer's statement, stating whether it agrees or disagrees with that statement, and why.

3) identify the inquiries made concerning access to the platform and NYT's actions taken on these inquiries;

4) identify the video programmers accessing NYT's platform, the services offered by these video programmers, and the number of channels used by each programmer;

5) include a survey of end users sufficient to evaluate whether end users had non-discriminatory access to each programmer and programming offered over the platform.

6) evaluate the effectiveness of the video dialtone technology used during the trial, and include information on operation of the video switch(es), store-and-forward capability, methods of accessing the basic platform, and the impact of incorporating digital technology into the network. In addition, NYT shall provide subjective evaluations by trial participants of the quality of the video dialtone service offered.

7) detail the costs NYT has allocated to the trial, broken down into subsidiary accounting records.

8) include any published commentary that NYT is aware of regarding the trial.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SEG CELLULAR LIMITED PARTNERSHIP — File No. 163500-91-26-MHK

Notice of Apparent Liability for Forfeiture
Penalty for Station KNKA586 in the
Domestic Public Cellular Radio
Telecommunications Service serving Market
102A, Des Moines, Iowa

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: June 14, 1993; Released: June 28, 1993

By the Commission:

I. INTRODUCTION

1. SEG Cellular Limited Partnership (SEG) and its parent company United States Cellular Corporation (USCC) (SEG and USCC, collectively, petitioners) have filed a Petition for Reconsideration of a Commission order[1] which granted in part and denied in all other respects SEG's request for remission or reduction of a Notice of Apparent Liability for Forfeiture (*NALF*) we previously had issued.[2] For the reasons stated below, we deny the petitioners' request.

II. BACKGROUND

2. In April 1990, SEG filed an application proposing to construct cell sites at Indianola and Dallas, Iowa. The Commission cleared the antenna for the Indianola site but not for the Dallas site. Moreover, no construction authority was granted. Nonetheless, in November 1990, SEG filed FCC Form 489, notifying the Commission that it had completed construction of the Indianola site and a new cell site at Panther, Iowa. In its notification, SEG replaced the Dallas site with the Panther site. The Mobile Services Division (MSD) inadvertently issued an authorization in January 1991 for the Indianola and Panther sites but, upon discovering that it had not yet acted on SEG's original application, the MSD notified SEG of the unauthorized construction. USCC assumed control of SEG in March 1991.[3] In August 1991, SEG filed a request for Special Temporary Authority to continue operating and also filed the appropriate application to correct its unauthorized construction. The *NALF* was issued in January 1992.

3. In the *NALF*, we found that: (1) SEG constructed and placed into operation the Indianola and Panther cell sites in apparent violation of both Section 301 of the Communications Act (the Act) and Section 22.3 of the Commission's Rules because SEG did not receive authority for construction; and (2) SEG's construction constituted willful and repeated conduct within the terms of the Act. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), we found that the base forfeiture amount for constructing at an unauthorized location is $40,000 but because SEG constructed unauthorized cells at two different locations, we doubled the forfeiture to $80,000.

4. SEG filed a response to the *NALF*, requesting remission or reduction of the $80,000 forfeiture and claiming that the construction of the two cells was an inadvertent mistake and not "willful and repeated" conduct. SEG also asserted that the violation was minor in nature, not egregious misconduct, and it had voluntarily disclosed the unauthorized construction to the Commission on two occasions, first, in November 1990, when SEG filed its FCC Form 489 in the mistaken belief that its construction was authorized, and second, in July 1991, when USCC's counsel called the Commission after USCC determined that the cells were constructed before they were authorized. In addition, SEG asserted that both SEG and USCC had never previously been found by the Commission to have violated any rule in any market.

5. We rejected SEG's argument that its violation did not constitute willful and repeated conduct. We cited Section 312(f)(1) of the Act and pointed out that a violation, even if inadvertent, may still be treated as willful under the Act and the Commission's Rules. *SEG Order* at 7 FCC Rcd 5921. We also stated that because SEG committed two violations by constructing two cells without authorization, it "repeated" its violation within the meaning of Section 503(b) of the Act. *Id.* Further, we rejected SEG's argument that its unauthorized construction should be treated as minor, since we found that SEG had constructed entire antenna facilities without authorization. *Id.* Additionally, we found that SEG did not voluntarily disclose its unauthorized construction because SEG's November 1990 filing did not provide any notification that the constructed facilities were unauthorized. In addition, SEG's conversation with Commission staff in July 1991 does not constitute official notice, and SEG acknowledged that when it called, it was told the matter already was being investigated by the MSD. We did, however, accept SEG's contention that the forfeiture should be adjusted downward because of SEG's history of overall compliance with Commission rules and, consequently, we reduced the $80,000 forfeiture to $64,000.

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[1] *SEG Cellular Limited Partnership*, Memorandum Opinion and Order, 7 FCC Rcd 5920 (1992) (*SEG Order*).

[2] *SEG Cellular Limited Partnership*, Notice of Apparent Liability, 7 FCC Rcd 74 (1991).

[3] Three individuals were the original SEG partners when SEG was granted its Des Moines construction permit on December 23, 1986. USCC acquired an aggregate 40 percent interest in SEG and became both a general and limited partner by a December 23, 1986, agreement. The three original partners, however, voted as a block and had control over SEG at all relevant times until March 25, 1991, when SEG acquired control pursuant to Commission consent.

III. PETITION FOR RECONSIDERATION

6. USCC requests a Commission finding that the violation was inadvertent and not intentional, that USCC took all reasonable steps to come into compliance with Commission rules after USCC became aware that SEG violated the rules, and that no adverse reflection on USCC's licensee qualifications is appropriate. USCC also requests that the Commission reconsider and reverse our findings that SEG did not voluntarily disclose its unauthorized construction of the two cells and the construction of the two cells constituted "willful and repeated conduct."[4]

IV. DISCUSSION

7. Upon review of the record and the conclusions we previously reached in the *NALF* and the *SEG Order*, we find that our conclusions were not in error and did not violate the Act, our Rules, or the *Policy Statement*.[5] Furthermore, petitioners have not raised grounds sufficient to grant reconsideration pursuant to Section 1.106 of our Rules.[6]

8. In seeking a finding that the violations at issue were inadvertent, the petitioners seem to miss the point of the statute and the Commission's Rules. Inadvertence, by the very terms of the Act, does not prevent the violation from being classified as "willful". This distinction was explained in detail in the *SEG Order* and therefore need not be repeated here. *See* 7 FCC Rcd at 5921 para. 9; and note 6, *infra*. Regarding petitioners' contention that the violations were not "repeated," this also was explained in the *SEG Order*. *See* 7 FCC Rcd at 5921 para. 9; and note 6, *infra*. As to the request that we find that the petitioners took all reasonable steps to come into compliance with our rules when USCC became aware of the rule violations, and that the violations should not reflect on USCC's license qualifications, we find both requests irrelevant in considering whether to grant reconsideration. Simply put, violations occurred, and we properly dealt with relevant matters in establishing the forfeiture.

9. Finally, regarding the request that we reverse our finding that SEG did not voluntarily disclose its unauthorized construction, we reiterate that: (1) SEG's November 1990 FCC Form 489 did not provide any notification that the constructed facilities were unauthorized; (2) SEG's conversation with a Commission staff member does not constitute official notice;[7] and (3) SEG acknowledged that when it did call the Commission, the unauthorized construction already was under investigation by the MSD. Consequently, because the Commission was aware of the violation before SEG contacted the Commission, SEG is not entitled to credit for voluntary disclosure.

V. CONCLUSION

10. As a result, we find no basis upon which to grant petitioners' request for reconsideration of the *SEG Order*.

VI. ORDERING PARAGRAPHS

11. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by SEG Cellular Limited Partnership and United States Cellular Corporation in the above-captioned proceeding IS DENIED.

12. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that SEG Cellular Limited Partnership SHALL FORFEIT to the United States the sum of sixty four thousand dollars ($64,000) for violation of Section 301 of the Communications Act of 1934, and Section 22.3 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

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[4] USCC also asks that the Commission make any downward adjustment to the $64,000 forfeiture deemed appropriate, but stresses that this request is of secondary concern due to its request for a finding that it acted in a conscientious and responsible manner when USCC determined an error was made.

[5] The *SEG Order* incorrectly stated that SEG filed FCC Form 489 on August 7, 1991, as an amendment to its application, rather than the proper FCC Form 401. In actuality, SEG amended its pending FCC Form 401 on August 7, 1991, to substitute the Panther, Iowa, site for the previously proposed Dallas, Iowa, site. We emphasize that this fact is not of decisional significance and was not the basis for any of our conclusions in the *SEG Order*. *See* 7 FCC Rcd at 5920 para. 3.

[6] Section 1.106(b)(2) provides in relevant part:

> ... a petition for reconsideration will be entertained only if one or more of the following circumstances is present:
>
> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

Consequently, because none of these circumstances is present and the petitioners do not claim otherwise, no basis exists to grant reconsideration.

[7] SEG does not cite any authority, or make any convincing argument, that its telephone conversation constitutes official notice to the Commission. Because the MSD had not yet acted on SEG's original application, it remained pending. Section 1.65 of the Commission's Rules pertains to "[s]ubstantial and significant changes in information furnished by applicants to the Commission." In relevant part, Section 1.65(b) provides that:

> ... whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate ...

SEG's July 1991 telephone conversation does not comply with this procedure.

13. IT IS FURTHER ORDERED that if the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

14. IT IS FURTHER ORDERED that a copy of this Order BE SENT to SEG Cellular Limited Partnership by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-350

In re Applications of

EMISION DE RADIO BALMASEDA, INC.	File No. BPH-870505MA
SAFE CARE, INC.	File No. BPH-870505MB
CHAMELEON BROADCASTING, INC.	File No. BPH-870506MH
DALE BROADCASTING, INC.	File No. BPH-870506MK
FIRST COAST RADIO, INC.	File No. BPH-870506MN
LEEANN KENDALL SCOPINICH	File No. BPH-870506MQ

For Construction Permit for a
New FM Station on Channel 293A
in Ponte Vedra Beach, Florida

ORDER

Adopted: June 18, 1993; Released: June 28, 1992

By the Commission:

1. Before the Commission for consideration are Review Board decisions, *Emision De Radio Balmeseda, Inc.*,[1] 7 FCC Rcd 3852 (Rev. Bd. 1992) and 7 FCC Rcd 8629 (Rev. Bd. 1992), and an Application for Review filed January 22, 1993 by Chameleon Broadcasting, Inc. A Joint Opposition was filed February 8, 1993 by Emision de Radio Balmaseda, Safe Care, Inc., Dale Broadcasting, Inc., First Coast Radio, Inc. and Leeann Kendall Scopinich, who have entered into a settlement agreement resulting in the grant of Emision's application. We agree with the Board's resolution of this case. However, comment is warranted.

2. Chameleon argues that the Board erred in giving unequal treatment to its application and that of Emision and in finding that it was not financially qualified to be a licensee. It asserts that Emision failed to document how it would finance the $300,000 in debt incurred as part of the settlement, while Chameleon has documented its own financial qualifications. The Board correctly held that Chameleon did not proffer specific allegations of fact sufficient to warrant further hearing concerning Emision's qualifications. 7 FCC Rcd at 8629 ¶ 2.[2] Moreover, Chameleon's Application for Review contains no allegations raising a substantial and material question of fact concerning Emision's proposal.

3. In contrast to Emision, an issue was specified concerning Chameleon's financial proposal. In response to that issue, Chameleon relied on the offer of a loan from Mr. and Mrs. Robert Jones to establish its qualifications. It asserts that reasonable assurance of a loan commitment was documented by letters from Mr. Jones which were read into the record (Tr. 312-15), statements from Mr. and Mrs. Jones, (Chameleon Exs. 13-14), and the testimony of a Chameleon principal claiming that the terms of the purported loan agreement would be fixed at a later date and would consist of conventional loan terms. Chameleon Ex. 11 at p. 3. However, while there are indications that Mr. and Mrs. Jones were interested in loaning money to finance the proposed station and that they had conversations with Chameleon's principals, there is no objective evidence that there were negotiations or an agreement identifying mutually satisfactory terms for a loan. The loan offer was eventually withdrawn before there were negotiations for terms for the proposed loan and the Board properly found that Chameleon lacked reasonable assurance of a loan commitment. 7 FCC Rcd at 3856 ¶ ¶ 24-27. See also *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 ¶ 12 (Rev. Bd. 1990), rev. den. 6 FCC Rcd 1893 (1991).[3] Thus, the applicants are not similarly situated and they have not been improperly accorded disparate treatment.

4. Finally, we take this opportunity to address one further matter. In *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 ¶ ¶ 12-14 (1989), we held that an applicant filing under the process adopted in *Revision of Form 301*, 50 RR 2d 381, 382 ¶ 6 (1981), need not have documentation of its financial qualifications at the time its application is filed, but must be able to prepare and submit such supporting materials upon request. We note, in this regard, that the Court of Appeals has questioned this ruling in light of an earlier Review Board assertion that all applicants must have written documentation in hand at the time of filing. See *Northampton Media Associates v. FCC*, 941 F.2d 1214, 1216 (D.C. Cir. 1991), and *Weyburn Broadcasting Limited Partnership v. FCC*, No. 91-1378 (D.C. Cir. Feb. 12, 1993). The Court stated that the Commission had not met its basic obligation to provide a reasoned explanation for its change in practice. *Weyburn, supra*, Slip Op. at 17.

5. In response, we observe that our statement in *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562, 4563 n.4 (1990), that the Board's assertion had been effectively overruled, was based on our explanation in *Northampton*, 4

[1] The name of the lead applicant in this proceeding has heretofore been erroneously spelled as Emision de Radio Balmeseda, Inc. The caption is hereby corrected to read Emision de Radio Balmaseda, Inc.

[2] Mere allegations of additional settlement expenses are not a basis for reopening the record. *Evergreen Broadcasting Co.*, 7 FCC Rcd 6601, 6607 ¶ 32 (1992); *Susan D. Brown*, 6 FCC Rcd 7210, 7210-11 ¶ ¶ 5-7 (Rev. Bd. 1991).

[3] Chameleon's subsequent efforts to rely on new loan commitments were rejected as deficient by the ALJ. Tr. 1301-04; 1372. In view of the fact that Chameleon was not financially qualified when it filed its application, its subsequent efforts to establish its financial qualifications have no decisional significance.

FCC Rcd at 5518-19 ¶ 14, that our 1981 revision of FCC Form 301 was expressly intended to spare applicants "the time and effort necessary *to prepare* and submit the documentation previously required." It is our view that it would have been unfair and inappropriate, in light of our earlier 1981 decision to spare applicants "the time and effort necessary to prepare and submit the documentation previously required," to fault an applicant using the revised Form 301 for the mere failure to have such documentation on hand at the time its application was filed. Thus, our holding that the Board had erred was premised explicitly upon our reading of our 1981 decision, which relaxed paperwork burdens on applicants but did not relieve them of the duty to show they were financially qualified when they so certified in the event of a proper challenge. Because the Board had expressed an inconsistent view as to the 1981 decision, we believed then, and we continue to believe now, that *Northampton* met our obligation to explain why we overruled our subordinate body.

6. ACCORDINGLY, IT IS ORDERED That the Application for Review filed January 22, 1993 by Chameleon Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-178

In re Applications of

HOWARD B. DOLGOFF (hereafter "Dolgoff") File No. BPH-911223ME

MARK AND RENEE CARTER (hereafter "Carter") File No. BPH-911224MD

For Construction Permit for a New FM Station on Channel 292A in Miramar Beach, Florida.

HEARING DESIGNATION ORDER

Adopted: June 15, 1993; Released: June 28, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Dolgoff*. A study of Dolgoff's application, as timely amended on May 4, 1992, reveals that it is short-spaced by 9.8 kilometers to the licensed facilities of co-channel station WKNU(FM), Brewton, Alabama.[1] Dolgoff recognizes this short spacing and requests processing pursuant to the provisions of 47 C.F.R. § 73.213(c)(1).[2]

3. The staff has concluded that Dolgoff's amended application may be processed pursuant to Section 73.213(c)(1) with respect to WKNU(FM).[3] Section 73.213(c)(1) states, in pertinent part, that each application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters HAAT (or equivalent lower ERP and higher antenna HAAT based on the class contour distance of 24 kilometers) must specify a transmitter site that meets the minimum distance separation requirement set forth in the paragraph.[4] In order to comply with Section 73.213(c)(1), Dolgoff's application proposes a directional antenna to reduce the radiation in the arc towards WKNU(FM) to the equivalent of an "old" Class A station (3 kW/100 m HAAT). A staff study confirms that Dolgoff's application, as amended, proposes no more than 3 kw/100 meters HAAT, or the equivalent thereof, in the arc toward short-spaced station WKNU(FM). Therefore, the proposal falls within the limitations set forth in Section 73.213(c)(1) with respect to WKNU(FM). When applying Section 73.213(c)(1), it has been staff practice to accept radiation limitations equivalent to the old Class A limit (3 kW/100 m HAAT or equivalent) in the arc toward the short-spaced station. In the instant case, Dolgoff's application specifies 6 kilowatts ERP, but proposes only 3 kilowatts in the arc toward the short-spaced station (WKNU) by utilizing a directional antenna. Therefore, by applying the rule on a station-to-station basis, Dolgoff's proposal is not in violation of the provisions of Section 73.213(c)(1). Accordingly, Carter's Petition to Deny filed against the Dolgoff application will be denied.

4. Since no determination has been received from the FAA as to whether the antenna proposed by Dolgoff would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

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[1] The required spacing for co-channel Class A to Class A stations pursuant to 47 C.F.R. § 73.207 is 115 kilometers while the actual spacing proposed in the application is 105.2 kilometers. This 9.8 kilometers short-spacing was created by the revision of 47 C.F.R. § 73.207 in the *Second Report and Order* in MM Docket No. 88-375, adopted July 13, 1989 and released on August 18, 1989. *See* 4 FCC Rcd 6375 (1989). Stations which became short-spaced as a result of the adoption of these new rules are now governed by 47 C.F.R. § 73.213(c), which permits such stations to make changes based upon the old spacing rules, provided that the short-spaced Class A stations do not exceed 3.0 kilowatts ERP and 100 meters HAAT, or the equivalent thereof.

[2] The *Report and Order* in MM Docket 89-126, note 5, indicated that applicants may avail themselves of the provisions of Section 73.213(c) with respect to Station WKNU(FM), Channel 292A, Brewton, Alabama. *See Miramar Beach, Florida*, 6 FCC Rcd 5778 (MM Bur. 1991). Since the Miramar Beach, Florida rulemaking was initiated before the October 2, 1989 effective date of the new 47 C.F.R. § 73.207 rules, the allotment came under the "old" rules with respect to WKNU(FM). Under the old rules, the allotment met the distance separation requirement with respect to WKNU(FM). Under the new rules, however, the allotment is short-spaced to WKNU(FM). Accordingly, any application filed for the allotment could be processed under the "old" rules with respect to WKNU(FM).

[3] On June 4, 1992, Carter filed a Petition to Deny against Dolgoff's application alleging that Dolgoff's proposal violates 47 C.F.R. § 73.213, and the amended application must be rejected as patently not in compliance with the section of the rules pursuant to which processing was requested. On July 9, 1992, Dolgoff filed an Opposition to Petition to Deny concluding that processing pursuant to Section 73.213(c) is proper, appropriate, and fully sanctioned by the Commission.

[4] Dolgoff's application is in compliance with this minimum distance separation requirement.

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Dolgoff would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHERED ORDERED, That the Petition to Deny filed by Carter on June 4, 1992 IS DENIED.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-176

In re Application of

RICHARD RICHARDS File No. BRTTL-921116IG

For Renewal of License
of Low Power Television
Station K33CG,
Sierra Vista, Arizona

HEARING DESIGNATION ORDER

Adopted: June 11, 1993; Released: June 28, 1993

By the Commission:

1. The Commission has before it for consideration the application of Richard Richards (Richards) for renewal of license of low power television station K33CG, Sierra Vista, Arizona.

2. Richards is the licensee of low power television station K33CG, Sierra Vista, Arizona. On May 4, 1992, Richards pled guilty in the United States District Court for the District of Arizona to possession with intent to distribute marijuana and cultivating marijuana on federal property, felonies in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(D) and 841(b)(5). On July 31, 1992, Richards was convicted and sentenced to five years probation and seven months house arrest. On November 16, 1992, Richards filed an application to renew the license of station K33CG.

3. The Commission considers felony convictions relevant to our evaluation of a licensee's character. *Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted*, 7 FCC Rcd 6564 (1992). Moreover, the Commission regards drug trafficking as a matter of the gravest concern and we have stated our intention to apply policies that reinforce both private and governmental efforts to eradicate drug trafficking.[1] In this regard, we stated our intent to take all appropriate steps, including license revocation proceedings, where information comes to our attention that Commission licensees or their principals have been convicted of drug trafficking. *Public Notice*, 4 FCC Rcd 7533 (1989). Consequently, we believe that Richards' July 1992 felony drug conviction raises substantial and material questions as to whether he possesses the requisite character qualifications to remain the licensee of station K33CG. *See Williamsburg County Broadcasting Corp.*, 5 FCC Rcd 3034 (1990). Accordingly, we conclude that a hearing should be held to determine if the license of station K33CG warrants renewal.[2]

4. Accordingly, IT IS ORDERED, That pursuant to Title 47, United States Code, Section 309(e), the application of Richard Richards for renewal of license of station K33CG, Sierra Vista, Arizona, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine, in light of Richard Richards' conviction for violating Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(D) and 841(b)(5), whether Richards possesses the requisite qualifications to be the licensee of station K33CG.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether the grant of the application to renew the license of station K33CG will serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and burden of proof with respect to issues (a) and (b) shall be upon Richards.

6. IT IS FURTHER ORDERED, That to avail himself of the opportunity to be heard, the party respondent herein, pursuant to Section 1.221 of the Commission's rules, 47 C.F.R. Section 1.221, shall file with the Commission, within (20) days of the mailing of this Order, a written appearance in triplicate, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That Richards shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 United States Code Section 311(a)(2), and Section 73.3594(f) of the Commission's rules, 47 C.F.R. Section 73.3594(f), give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(f) of the Commission's rules.

8. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, send a copy of this Order, Certified Mail-Return Receipt Requested, to the party to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (1988); Federal Drug Free Workplace Act, Pub. L. No. 100-71 (1987); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-750 (1986); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984); Executive Order 12696, President's Drug Advisory Council, 54 Fed. Reg. 47,507 (1989); Executive Order 12595, White House Conference for a Drug Free America, 52 Fed. Reg. 17,383 (1987); Executive Order 12590, National Drug Policy Board, 52 Fed. Reg. 10,021 (1987); Executive Order 12564, Drug Free Federal Workplace, 51 Fed. Reg. 32,889 (1986).

[2] Further, a related application to assign the license of station K33CG from Richards to Elsie Weick (File No. BALTTL-920603JC) shall be held in abeyance pending the outcome of the license renewal proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-189

In re Application of

Stephen W. Yates

For Renewal of License of Station KSRK(AM), Lufkin, Texas — BR-900402E6

HEARING DESIGNATION ORDER

Adopted: June 17, 1993; Released: June 28, 1993

By the Chief, Audio Services Division:

1. The Chief, Audio Services Division, Mass Media Bureau, has before him: (a) the captioned application for renewal of license filed by Stephen W. Yates, licensee of KSRK(AM), Lufkin, Texas;[1] and, (b) the results of an investigation into KSRK(AM)'s silent status.[2]

2. The Commission's records indicate that KSRK(AM) has been silent since May 20, 1988.[3] The station's authority to remain silent expired on June 3, 1993. The current renewal of license application for KSRK(AM) has not been acted upon because of the station's silent status.[4] Since the 1990 assignment of license, there is no evidence that Mr. Yates has ever commenced station operations.

3. By letter dated July 27, 1992, Mr. Yates requested that the Commission cancel the KSRK(AM) license. Prior to Commission action on that request, Mr. Yates, by letter dated November 10, 1992, indicated that he had found an individual willing to invest the necessary funds to return KSRK(AM) to the air and withdrew his request for cancellation of the station's license. Acknowledging the changed circumstances surrounding the withdrawal request, the Chief, AM Branch, Audio Services Division, Mass Media Bureau, by letter dated March 3, 1993, notified Mr. Yates that KSRK(AM) would receive silent authority until June 3, 1993, with the condition that any further requests for silent authority be accompanied by a detailed summary of steps taken to return the station to the air. No further requests have been received. Moreover, no application proposing the assignment of the KSRK(AM) license or for a construction permit to improve the facilities of KSRK(AM) has been filed with the Commission. Consequently, KSRK(AM) is currently off the air without authority. This fact, coupled with the fact that KSRK(AM) has been off the air for over five years, supports our determination that Mr. Yates is in apparent violation of Sections 73.1740(a)(4) (Minimum Operating Schedule) and 73.1750 (Discontinuance of Operation) of the Commission's Rules.[5] We believe that the evidence before us is sufficient to raise a substantial and material question of fact regarding Mr. Yates' capability and intent to resume the broadcast operations of KSRK(AM). We will therefore designate the KSRK(AM) renewal of license application for an evidentiary hearing on appropriate issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309(e), the renewal of license applications of Station KSRK(AM), Lufkin, Texas, IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether Stephen W. Yates has the capability and intent to expeditiously resume broadcast operations of KSRK(AM) consistent with the Commission's Rules.

(b) To determine whether Stephen W. Yates has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules;

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[1] The Commission consented to the assignment of the KSRK(AM) license from Pine Air, Inc. to Mr. Yates on January 10, 1990. The sale of the station was consummated on May 10, 1990.

[2] The Mass Media Bureau has been delegated authority to designate for hearing the renewal of license applications of silent broadcast stations. *See Moenkopi Communications, Inc.*, 8 FCC Rcd _____, FCC 93-273, adopted May 25, 1993.

[3] The reason given for the initial request for silent authority was to allow time to make necessary repairs to the station due to fire-damage.

[4] It is the Commission's general policy to defer action on a station's renewal of license application while that station is silent.

[5] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

(c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED, That, in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

6. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the LICENSEE, Stephen W. Yates.

7. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.221(c) of the Commission's Rules, SHALL FILE with the Commission, in person or by attorney, within twenty (20) days of the mailing of this Order, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the licensee herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rules, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

9. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order denying the renewal of license application of KSRK(AM), Lufkin, Texas, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint

LAWTON CHILES, BOB MARTINEZ,
and BILL NELSON

Against Station WTVT(TV),
Tampa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1993; Released: June 29, 1993

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it "Complainants' Motion for Extension of Discovery Period, and Motion for Further Discovery" ("Motion") filed on February 16, 1993, by Lawton Chiles, Bob Martinez and Bill Nelson ("Complainants"). On February 24, 1993, WTVT License, Inc. ("WTVT") filed an "Opposition to Complainants' Motion for Extension of Discovery Period and Motion for Further Discovery" ("Opposition"). On March 4, 1993, WTVT filed a "Motion to Dismiss as Moot 'Complainants' Motion for Extension of Discovery Period, and Motion for Further Discovery,'"[1] and on March 10, 1993, Complainants filed their "Opposition" thereto.

2. Complainants seek further discovery in the form of depositions of two employees of WTVT, Mark Demopoulos and Mark Higgins. Complainants also propose interrogatories to learn addresses and other information with regard to 43 individuals who were involved in sales at WTVT. Complainants assert that the further discovery requested is necessary in order to determine whether there was a genuine risk of preemption of commercial advertisers who purchased preemptible time on WTVT.

3. Complainants contend that the deposition of Demopoulos is necessary in order to clear up alleged inconsistencies relating to his descriptions of preemption practices at WTVT which were made in declarations submitted by him in this proceeding. Specifically, Complainants show that in his December 16, 1992, declaration Demopoulos stated, "[b]y being a demand priced station preemptions were based solely on rate ...." However, in his declaration in response to interrogatory 1 of the *Further Discovery Order*, 8 FCC Rcd 714 (MMB 1993), Demopoulos stated, "[p]reemption of commercial advertisers were based primarily on rate however the following are minor criteria also considered in determining preemption which included: 1 - date in which order had been placed, 2 - actual rate differential 3 - Could higher rated spot move into a different time period or into a different week."

4. Complainants contend that a deposition is necessary to clear up this alleged inconsistency in the description of WTVT's preemption policy as well as to explore the actual application of the "minor criteria" which were considered along with rates in preemption decisions. Complainants list numerous examples where WTVT's records indicate that higher-priced spots did not run during specific dayparts and lower-priced spots were not preempted during the same specific dayparts. Complainants argue that these situations do not appear to satisfy the other "minor criteria" used by WTVT, in addition to rates, in determining whether a spot should be preempted. Complainants suggest that a deposition of Demopoulos will allow them to determine the true criteria for preemption decisions at WTVT. Moreover, Complainants contend that the deposition of Higgins will corroborate and clarify the explanations made by Demopoulos concerning WTVT's preemption practices.

5. Finally, Complainants contend that it is very difficult to determine, from the records provided by WTVT, when a spot was actually preempted. WTVT's records do not necessarily indicate whether a spot was preempted or whether it did not run for a variety of other reasons. Thus, when a spot did not run it would be marked "no avail" which might mean that it was preempted or that it did not run for some other reason. Moreover, Complainants state that their analysis of the preemption record of WTVT's "most favored advertiser" differs from WTVT's analysis. While WTVT stated that 17 out of 156 spots were preempted on contract 22, Complainants state that only 5 spots were actually preempted. In addition, while WTVT states that 5 of 101 spots were preempted on contract 31, Complainants state that only 2 spots were preempted. Complainants suggest that a deposition of Demopoulos will help to clear up this confusion concerning the recording of preemptions.

6. In its Opposition, WTVT generally claims that Complainants have sufficient information on hand with which to support their amended complaint. Moreover, WTVT contends that the Motion is just an attempt by Complainants to expand the scope of discovery. WTVT disputes the need for any further discovery.

7. WTVT states that the alleged discrepancy between the two declarations of Demopoulos can be explained when the statements are considered in the appropriate contexts. According to WTVT, the December 16, 1992, declaration by Demopoulos, that WTVT's preemptions were based solely on rates, was made in response to a question whether WTVT's preemptions were based on an alpha/numeric system reflected on WTVT's orders. WTVT claims that this statement by Demopoulos was not an attempt to describe WTVT's preemption policy in detail. The full context of the declaration is as follows:

> To further clarify paragraph 4 of the declaration dated December 1, 1992, the alpha/numeric codes as stated were used internally to assist in identifying the commercial type of each spot. The numeric codes were separated into two groups: 2-15 (regular commercial advertisers which purchased program specific time periods) and 20-24 (commercial advertisers

[1] WTVT seeks to have Complainants' request for further discovery dismissed as moot because Complainants have already filed their Amended Complaint. However, because we are ruling on the merits of Complainants' request, we will deny WTVT's Motion to Dismiss as Moot.

which purchased station rotations). The original intent was for each number to correspond to a specific rate through out the year, with 15 and 24 being the lowest rate and 2 and 20 being the highest rate. If codes had been utilized correctly the system would have preempted spots starting with the highest number 24 down to the lowest number of 2. However, the system was not utilized correctly; primarily because there was not enough man power to code each line of the national orders properly, so often times the entire order had one code, and secondarily because there was not a clear understanding of which code to use if a rate did not correspond exactly to a numeric code. By being a demand priced station preemptions were based solely on rate, and this alpha/numeric system was never used as originally structured. These codes did not reflect or were never intended to reflect if a commercial was purchased at a preemptible or non-preemptible rate. Again, preemption or non-preemption was determined by comparing rate purchased to the corresponding rate card/avails.

8. WTVT contends that the first time that it was required to give a full explanation of its preemption practices was in response to interrogatory 1 of the *Further Discovery Order*. WTVT submits that the more detailed explanation provided by Demopoulos in his February 1, 1993, declaration was accurate and did not contradict his earlier statement concerning preemption policy which was made in passing and in a different context.

9. WTVT analyzes the first four examples cited by Complainants where higher-priced spots did not run and lower-priced spots cleared. In the first two examples, WTVT was unable to determine why the higher-priced spots did not run. The third example was outside the political window because WTVT does not schedule political spots on election day. In the fourth example, the spot did not run because it was not received at the station until the day after it was scheduled to run. WTVT states that even if it failed to preempt the lowest commercial advertiser in every instance, that error did not work to the detriment of Complainants. If a lower-priced commercial spot ran, the political advertisers who bought preemptible time received that lowest-priced rate. Thus, the political advertisers benefited by receiving a lower rate than they would have had WTVT not erred.

10. WTVT contends that Complainants' request to depose Higgins, merely to corroborate the testimony of Demopoulos, is not sufficiently justified. Specifically, WTVT argues that corroboration is not an appropriate use of discovery.

11. WTVT claims that Complainants' further discovery request to clarify information provided in WTVT's preemption analysis filed in its Answer of March 2, 1992, is submitted much too late. WTVT contends that any such request should have been made at an earlier date.

12. WTVT also objects to providing addresses and other information concerning the 43 individuals who were involved in sales at the station. WTVT suggests that the information will be used for serving notices of depositions on these 43 individuals. As WTVT points out, the Bureau has already indicated that it could discern no need to depose so many individuals. Moreover, WTVT contends that there is no basis for assuming that these individuals would be able to reconstruct the earlier preemption decisions at WTVT.

13. Finally, WTVT claims that the notices of depositions are too broad and do not state the areas to be covered with sufficient specificity. The notices state that deponents will be questioned "on matters relating to advertising rates charged candidates and other advertisers during the period prior to the 1990 elections." WTVT argues that this description is too vague and is much broader than the *prima facie* case which the Commission found had been made by Complainants.

DISCUSSION

14. When the Commission asserted exclusive jurisdiction with respect to complaints involving potential violations of the lowest unit charge provisions of Section 315(b) of the Communications Act of 1934, as amended, it stated that it contemplated only "limited discovery subject to specific conditions." *Declaratory Ruling*, 6 FCC Rcd 7511, 7513 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992). Consistent with that directive, in the original *Order* in this proceeding, 7 FCC Rcd 6661 (MMB 1992), *recon. denied*, 8 FCC Rcd 131 (1992), we stated that further discovery by Complainants "will not be permitted as a matter of course, but only upon a showing that such discovery is necessary to resolution of the issues upon which discovery has been granted." *Order*, 7 FCC Rcd at 6665.

15. In our *Further Discover Order*, 8 FCC Rcd 714 (MMB 1993), using the above-stated guidelines, we allowed additional limited discovery by Complainants but denied their request for depositions. Therein we stated:

> should Complainants file a subsequent request [for depositions], they will face a two-part hurdle. First, Complainants will have to seek an extension of the 60-day discovery period by making a detailed, supported, good cause showing for grant thereof. Second, Complainants will have to demonstrate, with respect to *each* witness they seek to depose, that the individual's testimony is necessary to resolution of the issues upon which discovery has been granted. Such showing must include *specific* arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence. Absence of an adequate showing with respect to either of these elements will result in denial of Complainants' request for depositions.

Further Discovery Order, at 717.

16. We will deny Complainants' request for depositions because Complainants have failed to demonstrate first, that the proposed testimony is necessary for resolution of the issues in this proceeding; and second, that use of depositions would be the appropriate means of acquiring the information they seek. We will also deny Complainants' request for further interrogatories because Complainants have not shown that the addresses of the individuals they have listed are necessary for resolution of the issues.

17. Demopoulos' deposition does not appear to be necessary in order to clarify alleged inconsistencies. We do not believe that the declarations of Demopoulos dated December 16, 1992, and February 1, 1993, are inconsistent or contradictory. It appears that the statement that WTVT's preemptions were based solely on rate, which was made in

the December 16 declaration, was not intended as a complete explanation of WTVT's preemption practices. The main purpose of the December 16 declaration was to explain that certain alpha/numeric codes were not used in making preemption decisions. It was only later, when specifically asked in an interrogatory, that Demopoulos provided a detailed description of WTVT's preemption practices.

18. Complainants also have not demonstrated adequately the need for the specific information they desire to elicit through depositions -- why certain preemption decisions were made. The single issue on which discovery has been allowed is whether Complainants had the benefit of the lowest unit charges for the respective classes of time on WTVT during the political seasons. As to the question whether commercial advertisers who purchased preemptible time in effect obtained fixed time, WTVT has already answered an interrogatory stating the basis for its preemption decisions with regard to commercial advertisers. Moreover, WTVT has submitted evidence that its preemptible class of time was not functionally equivalent to its fixed class of time.[2] Indeed, the record before us appears to refute Complainants' argument that preemptible rates were functionally equivalent to WTVT's fixed class of time, because the evidence submitted demonstrates that commercial advertisers were in fact, preempted. Given the absence of documentary evidence submitted by Complainants that supports their allegations that WTVT's preemptible rates were the functional equivalent of fixed rates, Complainants' proposal to pursue this line of questioning in depositions is not adequately supported and is no more than an unsubstantiated "fishing expedition."[3]

19. Moreover, we do not believe that Complainants have made an adequate showing to justify the need for additional discovery to determine whether WTVT's "most favored advertiser" may have been preempted less frequently than suggested by WTVT. The mere fact that some preemptions may have been based on permissible factors other than rates, a fact consistent with WTVT's preemption policy, does not by itself justify further discovery on this issue. Furthermore, we again note that the documentation provided by Complainants simply does not support their contention that WTVT's preemptible time was the functional equivalent of fixed time or that certain advertisers were preempted less frequently, because the record shows that even WTVT's "most favored advertiser" had its preemptible spots preempted.

20. As to the second prong of their showing, Complainants have failed to demonstrate that depositions are the appropriate means for obtaining the information they seek. In order to determine why any particular spot was or was not preempted could require research of station records involving orders, contracts, invoices and logs. This time-consuming exercise would not be appropriate for a deposition where a witness is presented to answer oral questions. A deposition does not appear to be the proper place for the laborious task of cross-checking documents which would be necessary to answer Complainants' questions on preemption decisions. If Complainants truly desired to know the reasons for certain preemption decisions a more appropriate means for obtaining this information would have been by use of interrogatories.[4] As stated earlier, the depositions proposed by Complainants do not appear to be intended to obtain information necessary for the resolution of the issues, but as a means of exploring new areas in search of additional issues.

21. An additional reason for denying the requested deposition of Higgins is that Complainants have not shown that corroboration of the testimony of Demopoulos is required. Complainants have not shown that Higgins has any particular knowledge which could not be obtained from Demopoulos. Thus, even if we allowed the deposition of Demopoulos, we would not allow the deposition of Higgins because Complainants have not shown why the testimony of that particular witness is necessary.

22. Finally, in light of our decision not to allow the depositions of Demopoulos and Higgins, it is not necessary to propound further interrogatories to WTVT seeking the addresses of certain individuals. Complainants have demonstrated no useful purpose for obtaining those addresses and have failed to show that the addresses are necessary for resolution of the issues in this proceeding.

23. In light of the foregoing, Complainants' Motion for Extension of Discovery Period,[5] and Motion for Further Discovery IS DENIED, and WTVT's Motion to Dismiss as Moot IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[2] See exhibit 10 to WTVT's Answer filed March 2, 1992, and exhibit A to WTVT's Answer to Amended Complaint.

[3] We note that Complainants have submitted a substantial volume of materials that allegedly support their claims that further discovery is required. Complainants do not, however, provide adequate analysis of the material submitted to show that it, in fact, supports their allegations. The mere submission of volumes of paper, with minimal analysis or explanation of its relation to the claims presented in the attached pleading, is not sufficient to meet the burden of proof articulated for a showing that further discovery is necessary. *See*, paragraph 15 *supra*.

[4] We note that Complainants have not requested, nor do we perceive any valid reasons for, an extension of the discovery period to allow Complainants to reform their discovery request in the form of interrogatories.

[5] Because Complainants have not demonstrated the need for the discovery they have requested, we need not reach the issue of whether they have justified an extension of the discovery period.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-177

In the Matter of

An Inquiry into the Commission's Policies and Rules regarding AM Radio Service Directional Antenna Performance Verification — RM-7594

NOTICE OF INQUIRY

Adopted: June 14, 1993; Released: June 29, 1993

Comment Date: August 20, 1993
Reply Date: September 7, 1993

By the Commission:

INTRODUCTION

1. The Commission has before it a petition for rulemaking (petition) submitted by the technical consulting firms duTreil, Lundin & Rackley, Inc.; Hatfield & Dawson Consulting Engineers, Inc. (Hatfield and Dawson); Lahm, Suffa & Cavell, Inc.; Moffet, Larson & Johnson, Inc.; and Silliman & Silliman (petitioners). The firms are jointly requesting that the Commission initiate an inquiry into the policies and rules pertaining to the performance verification of directional antenna systems at AM Broadcast Radio Service stations.[1] Specifically, petitioners ask that the Commission: (1) review the pertinence of the present regulations concerning AM directional antenna performance verification, given the significant environmental, technological and economic changes which have occurred since the present policies and rules were adopted; (2) determine whether the present regulations are effective in controlling interstation interference, particularly at night; and (3) consider the adoption of alternative regulatory means made possible by advances in antenna analysis methods and instrumentation technology.

2. Petitioners argue that the physical environment in which AM stations now operate is significantly changed from that which existed when our current rules were adopted. Many stations once located in rural areas have now been absorbed into expanding suburban and urban development, putting them in proximity to new buildings and other obstacles which can affect the magnitude and/or phase of the signals from AM antenna arrays. It is becoming increasingly difficult to find unobstructed field strength measurement locations in accordance with Section 73.186 of the rules. Petitioners also argue that improvements in technology, such as computer-aided numerical modeling of antenna performance, could lead to advances in antenna design and measurement techniques if the Commission's rules were amended. They also point out that adjustments of antenna arrays to establish the correct horizontal pattern in accordance with our rules may, inadvertently, cause the vertical pattern to depart from predicted values and cause unintended nighttime interference. The Commission's efforts when it restructured and improved the AM Service in Docket 87-267 could prove ineffective, petitioners argue, unless accurate measures are in place to assure that AM antennas are adjusted properly.[2]

3. Comments on the petition were filed by the following parties: duTreil, Lundin & Rackley, Inc.; Hatfield & Dawson; Lahm, Suffa & Cavell, Inc.; Moffet, Larson & Johnson, Inc.; CBS Inc.; Jules Cohen & Associates, P.C.; The National Association of Broadcasters (NAB); Capital Cities/ABC Inc.; and William G. Ball, P.E. Reply Comments were filed by Lahm, Suffa & Cavell, Inc. All commenters supported a Commission proceeding to examine the issues raised in the petition. Hatfield & Dawson, one of the petitioners originally requesting issuance of a Notice of Inquiry, stated in its comments that it now preferred a Notice of Proposed Rulemaking (NPRM), indicating that an Inquiry is unnecessary. A conference or forum of interested parties was suggested as a vehicle for developing specific rule changes for an NPRM. In their Reply Comments, Lahm, Suffa & Cavell, Inc., argued that the issuance now of an NPRM would probably not be wise and could lead to exactly the sort of delays Hatfield & Dawson were seeking to avoid. Lahm, Suffa & Cavell, Inc. argued that this is the time for a "more comprehensive proceeding that addresses all important philosophical, as well as mechanical, matters in the subject area."

BACKGROUND

4. As petitioners note, many of the current rules and policies governing AM directional antenna systems were adopted as part of the Commission's former *Standards of Good Engineering Practice* in 1939. Since that time, the rules have been amended many times, but the entire framework has never been comprehensively reexamined. A listing of the rule sections which are pertinent to this issue includes the following:

[1] An AM directional antenna array typically consists of 2 or more antenna towers, each of which receives power from the AM station transmitter. The power is fed to the antenna towers through "phasing networks", the purpose of which is to precisely determine the amount of power fed to each tower and the relative phase angles of the currents in each tower. This is done in order to control the direction(s) in which the antenna array radiates power. Directional arrays are used to provide strong signals in desired directions or to minimize interference to other stations, or both.

[2] The parameters of a directional antenna system, such as individual antenna currents or field strengths, may change over time and actual measurements on an operating antenna system can differ from the authorized or permitted values of those parameters. Therefore, the Commission requires that AM station licensees 'prove' the performance of their systems by making tests and measurements specified in Part 73 of the rules. These tests, and any subsequent adjustments to the array they indicate as necessary, are intended to assure that the antenna system is in full conformance with the terms and conditions of the station's license and the provisions of the Commission's rules. As an AM array increases in size, the complexity of these tests increases commensurately, and the time and costs involved in a proof of performance analysis can be significant.

73.14	Definitions: Antenna current; Critical Directional Antenna; Nominal Power; and Proof of Performance
73.33	Antenna systems; showing required
73.45	AM transmission system emission limitations
73.51	Determining operating power
73.53	Requirements for authorization of antenna monitors
73.54	Antenna resistance and reactance measurements
73.57	Remote reading antenna and common point ammeters
73.58	Indicating instruments
73.61	AM directional antenna field strength measurements
73.62	Directional antenna system tolerances
73.68	Sampling systems for antenna monitors
73.69	Antenna monitors
73.151	Field strength measurements to establish performance of directional antennas
73.152	Modification of directional antenna data
73.153	Field strength measurements in support of applications or evidence at hearings
73.154	AM directional partial proof of performance measurements
73.158	Directional antenna monitoring points
73.189	Minimum antenna heights or field strength requirements

5. The purpose of these rules is to set out the Commission's regulatory framework for assuring that AM directional arrays will be properly designed, constructed, tested, monitored and maintained. This is necessary because a misadjusted array could cause interference to cochannel and adjacent channel stations both locally, via groundwave signals, and at great distances, via skywave signals. Misadjustment of an array can arise from many causes, including faulty measurement equipment and faulty measurement procedures. It is often difficult to reconcile theoretical calculations of array performance with actual field measurements of an array's performance. Several sophisticated antenna array modeling programs are now available for use on computers which can predict patterns for very complex combinations of power and phase. It is difficult with these programs, however, to take into account the collateral effects of obstructions, such as buildings and nonresonant wires (e.g. power and telephone lines), which are proximate to the array being analyzed. As petitioners note, the formidable task of verifying actual array performance has put a significant financial burden on AM licensees.

6. In Docket 87-267, the Commission adopted a sweeping restructuring of the AM broadcast service in order to reduce the current level of interference in the band, and to make available new AM broadcast frequencies directly above the current band edge.[3] As commenters in that proceeding noted, misadjustment of AM directional arrays was a major contributing cause of high interference levels in the current band, and proper adjustment of any directional arrays licensed in the new band would be very important in controlling interference in that band. For this reason, and because the Commission's regulations have not been comprehensively evaluated in light of much of the new technology affecting array design and measurement, we believe it would now be appropriate to initiate a *Notice of Inquiry* into this matter.[4]

THE INQUIRY

7. In the broadest sense, this inquiry seeks to identify those portions of the current rules affecting AM directional arrays which ought to be the subject of a *Notice of Proposed Rulemaking*. We ask interested parties to review each of the rules listed in paragraph 4, *supra*, and any others which they find relevant, and evaluate which of these, in whole or part, ought to be amended or deleted. Criteria which may be of use in such evaluations include, but are not limited to, the following:

(a) What types of instrumentation are appropriate at the AM broadcast station for measuring antenna operating parameters? Where, physically and electrically, should this instrumentation be placed? Within what bounds of variation should parameters be maintained? What instrumentation error tolerance is acceptable? How frequently should the instrumentation readings be examined? How frequently should the instrumentation itself be calibrated, and to what standard? What type and extent of documentation of instrument readings should be generated and maintained? What information should be submitted to the Commission, and in what time frame(s)?

(b) What routine should be followed in taking measurements in the field? What parameters should be measured? What instrumentation is appropriate? At what distances should readings be taken? What should be the criteria for selecting sites for field measurements? To what degree should there be repeatability for readings from the same site?

(c) To what extent should theoretical, rather than measured, parameters be acceptable? Which theoretical computational routines are acceptable for use in lieu of measurements, and which are not? How is the difference between calculated and measured parameters to be resolved when the results differ? What magnitude of difference is acceptable, and what is too large?

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[3] *See Notice of Proposed Rule Making*, MM Docket No. 87-267, 5 FCC Rcd 4381 (1990) and *Report and Order*, MM Docket No. 87-267, 6 FCC Rcd 6273 (1991).

[4] We can understand Hatfield & Dawson's desire to proceed as rapidly as possible on this matter, but we agree with Lahm, Suffa & Cavell, Inc. that the number of issues involved, and their impact on the service, is of such a magnitude that a full record should be established first in an Inquiry, rather than proceeding immediately to a Notice of Proposed Rulemaking.

(d) To what degree is it practical or necessary to take into account other structures in the vicinity of the array? Which structures should be considered and which ignored? Can this ever be done theoretically, or must this effect always be measured in the field? Should the effect be remeasured/recalculated when new structures are added, or existing structures significantly modified or removed?

8. Our goal is to formulate a set of proposed rules which will ensure that array evaluations are done thoroughly and accurately, and to the degree necessary to meet the interference criteria put in place as a result of Docket 87-267. We wish to eliminate any redundant, outmoded or unnecessary rules, as well as any rules which impose a significant burden on licensees, without sacrificing the benefits of interference control. We will focus our efforts here, as we did in Docket 87-267 and related rulemakings, on formulating rules which promote the long term viability and quality of the AM Service.

PROCEDURAL MATTERS

9. This Notice of Inquiry is issued pursuant to authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before **August 20, 1993,** and reply comments on or before **September 7, 1993**. All relevant and timely filed comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Offices of the Secretary, Federal Communications Commission, Washington, D.C., 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington D.C., 20554. For further information, contact Joseph M. Johnson, Engineering Policy Branch, Policy and Rules Division, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In Re Applications of

Willie A. Jefferson d/b/a/ OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction permit for
New FM Station, Channel 275C2,
Shreveport, Louisiana.

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1993; **Released: June 29, 1993**

By the Commission: Commissioner Barrett concurring in the result and issuing a separate statement.

1. Now before the Commission are a Review Board decision, *Opportunity Broadcasting of Shreveport*, 7 FCC Rcd 3382 (1992); Applications for Review filed July 1, 1992 by Port City Communications L.P. and Caddo Broadcasting Limited Partnership (Caddo);[1] a Motion to Strike filed July 29, 1992 by Caddo;[2] and motions for leave to amend filed on October 29, 1992 and December 9, 1992 by NTW.[3] We agree with the Board's analysis of this case. Several matters, however, warrant further comment.

I. NTW

2. The other applicants argue that the lack of knowledge of NTW's 20 percent shareholder, Pete Harris, about certain aspects of the applicant's financing, site, engineering and organization is inconsistent with the credit given for his pledge to be integrated into the applicant's proposed operations. However, we do not consider Harris's unfamiliarity with all of the details of NTW's proposal dispositive. He actively participated in meetings involving the applicant's proposal (Tr. 140-42) and his equity interest, for which he paid (Tr. 96, 317), is proportionately tailored to the level of responsibility that he would hold in the proposed station. In this regard, we agree with the Board that the entire record, taken as a whole, reliably demonstrates that Harris would be able to effectuate his commitment to be integrated into NTW's proposed operations. 7 FCC Rcd at 3385 paras. 16-18.

3. Having concluded that Mr. Harris would be entitled to full integration credit for his 20 percent interest in NTW, we must now deal with NTW's motion for leave to file an amendment filed December 9, 1992. Mr. Harris died on September 30, 1992. By its motion, NTW requests that Mr. Harris' wife, Virginia R. Harris, be substituted for her husband. Under circumstances such as these, Commission precedent is to allow substitution of another individual so long as no comparative advantage is derived. *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248-50 (1978) (HDO permitted the applicant to name another principal, who had succeeded to the decedent's ownership interest, to fill the station management role left vacant by the decedent, and to vie for the same (but not greater) ownership integration credit than the decedent could have sought had he lived); *Mid-Florida Television Corp.*, 76 FCC 2d 158, 163 (1980) (stockholder permitted to take integrated station manager position of deceased stockholder but prohibited from receiving greater quantitative (credit). However, since Mrs. Harris was not previously a party to this application, it is also our practice to provide for such further hearings as may be necessary to allow the opposing parties to test her comparative qualifications. *Carta Corporation*, 5 FCC Rcd 3696, 3703 ¶ 23 (Rev. Bd. 1990). Nonetheless, we emphasize that this is a limited remand hearing, that the ALJ should confine the proceedings to consideration of the integration proposal of Mrs. Harris and the qualitative attributes associated with her ownership interest, and that a supplemental initial decision should be expeditiously prepared.

II. CADDO

4. In *Cotton Broadcasting Co.*, 4 FCC Rcd 1781 (1988), the Commission held that the limited partnership interest of a person who is also a general partner is relevant in determining the amount of an applicant's comparative credits. Citing *Cotton*, the Board reduced the enhancement credits awarded for one of Caddo's owners, Claudette

[1] Oppositions were filed July 15, 1992 by Caddo and July 16, 1992 by NTW, Inc. Opportunity Broadcasting of Shreveport did not file an application for review and thus, the Review Board's denial of Opportunity Broadcasting's application is final.

[2] NTW filed an Opposition on August 5, 1992 and Caddo filed a Reply on August 10, 1992. Caddo asserts that arguments in NTW's Opposition concerning Caddo's proposal, and not relating to matters raised in Caddo's Application for Review, should be stricken. In view of our conclusions concerning NTW's proposal, the pertinent arguments in NTW's Opposition and Caddo's Motion to Strike may be dismissed as moot.

[3] Oppositions to NTW's December 9, 1992 motion to amend were filed on December 18, 1992 by Port City and Caddo.

Greene, who has a 90 percent voting interest, because another of Caddo's owners, Paul Cox, has both a 10 percent voting interest and a 30 percent limited partnership interest. Relying on cases predating *Cotton*, Caddo asserts that the Commission only considers voting interests in assessing integration proposals. We agree with the Board that *Cotton* is controlling and that it has effectively overruled the cases on which Caddo relies. Therefore, the Board properly reduced the enhancement credits awarded for Greene's integration proposal. 7 FCC Rcd at 3384 ¶ ¶ 11-12.

5. Finally, Caddo argues that the Commission has never explained why local residence and minority ownership are given equal weight in the comparative process and that minority ownership should be given greater weight. This contention is without merit and does not warrant any modification in the disposition of this case. In *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), we clearly explained the reasons why we found that it was inappropriate to differentiate between the comparative weight credited for local residence and minority ownership. Moreover, it is well established that the Commission has "substantive discretion in weighing factors and granting licenses." *Citizens Communications Center v. F. C. C.*, 447 F. 2d 1201, 1212 n.33 (D.C. Cir. 1971). Caddo has not shown that the Commission abused its discretion in awarding equal comparative weight for local residence and minority ownership, it has not shown why minority ownership is entitled to greater weight, and it has not alleged facts which would compel a different conclusion.

6. ACCORDINGLY IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further proceedings to be conducted in accordance with this Memorandum Opinion and Order and for the preparation of a Supplemental Initial Decision.

7. IT IS FURTHER ORDERED, That exceptions, if any, to the Supplemental Initial Decision SHALL BE filed directly with the Commission.

8. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Applications for Review, filed July 1, 1992 by Port City Communications L.P. and Caddo Broadcasting Limited Partnership ARE DENIED.

9. IT IS FURTHER ORDERED, That the Motion to Strike filed July 29, 1992 by Caddo Broadcasting Limited Partnership IS DISMISSED as moot.

10. IT IS FURTHER ORDERED, That good cause having been shown, the petitions for leave to amend filed by NTW, Inc. on October 29, 1992 and December 9, 1992 concerning the death of Pete Harris and the succession of Virginia R. Harris to his interest ARE GRANTED, and the amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] The record demonstrates that both applicants have lived in the community of license for their entire lives, with the exception of a very brief period of time on the part of Port City's principal.

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Application for Review in the Shreveport, LA comparative FM proceeding (MM Docket No. 88-524).

I must voice concern with the outcome of a comparative hearing proceeding. My concern grows out of the fact that the comparative minority preference appears to have limited impact in the absence of past broadcast experience. In this case, NTW wins based on past broadcast experience and the fact that its principals are older than the principal of Port City.[1]

Port City's general partner is a minority who does not have substantial broadcast experience. He has some broadcast experience, but clearly it is not as extensive as NTW. He has lived in the community his entire life, except for his service in the military. I am concerned that at a time when this Commission should be encouraging minority ownership of broadcast stations, an applicant, who receives a 100% credit for minority ownerships, fails to succeed in the comparative process based on a lack of prior broadcast management or ownership experience. I question how the minority ownership policy can be effective if we penalize minority applicants who have not had the opportunity to work in broadcast stations in management level positions. It is clear to me that unless the Commission continues its efforts to aggressively enforce the broadcast EEO policies, minority applicants in this situation always will find "de facto" barriers erected in the comparative hearing process.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southern New England
Telephone Company

Petition for Waiver of Part 69
of the Commission's Rules

ORDER

Adopted: June 23, 1993; Released: June 30, 1993

By the Chief, Tariff Division:

1. On April 30, 1993, Southern New England Telephone Company (SNET) filed a petition for waiver of Part 69 of the Commission's rules, 47 C.F.R. Part 69. Specifically, SNET seeks a waiver to establish rate elements to recover the costs associated with its new Electronic Directory Assistance (EDA) service. The Part 69 rules do not currently establish a rate structure for EDA service.

2. SNET's proposed EDA service would permit interstate customers to obtain Connecticut telephone number listing information without operator interaction. SNET Petition at 1. The service would provide direct access to SNET's customer directory database. SNET represents that this database contains directory information for residence, business and government listings. The service would not have reverse search capability. *Id.* at 2.

3. SNET proposes to establish two nonrecurring charges for EDA service: the service establishment charge and the User ID charge. SNET maintains that the former is designed to recover the costs associated with establishing service for a customer and that the latter is designed to recover the nonrecurring costs of establishing and changing User ID numbers assigned to customer accounts. *Id.* SNET also proposes to establish a usage charge to be incurred for each screen of information returned. Additional recurring charges are proposed for customers that request magnetic tape or electronic transmission of usage information for the optional detail report. *Id.*

4. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that waiver petitions may be granted "if good cause therefor is shown." The Bureau has previously granted a similar waiver request from Southwestern Bell Telephone Company.[1] *See Southwestern Bell Telephone Company,* 5 FCC Rcd 3792 (Com. Car. Bur. 1990) (*Southwestern*). In *Southwestern* the Bureau noted that "[a]lthough electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service. A distinct charge to recover the unique costs of electronic directory assistance from only the users of that service would, therefore, be more consistent with the Commission's cost-causation policies." There is no material difference between Southwestern's service and SNET's EDA service. Thus, good cause exists to support SNET's waiver request and we therefore grant the waiver.

5. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Southern New England Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] The Bureau also granted a similar request to the Ameritech Operating Companies. *See Ameritech Operating Companies,* 5 FCC Rcd 7120 (Com. Car. Bur 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 25, 1993

BUREAU POSTPONES FILING DATE FOR AUTOMATED FORM M (ARMIS 43-02 AND 43-08) FROM JUNE 30 TO JULY 14

In a letter to the United States Telephone Association's Staff Director for the Form M Group, the group of carriers required to file Form M with the Commission, the Accounting and Audits Division postponed the due date of the filing from June 30, 1993 to July 14, 1993. The Division noted that it had been unable to provide the required edit check programs in a timely way, that it intended to provide them very soon, and that the two week extension was intended to allow the distribution and application of the edit checks prior to filing.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 21, 1993

Released: June 30, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Jacor Broadcasting of Colorado, Inc.
Licensee, Radio Station KOA
201 E. Fifth Street, #1300
Cincinnati, OH 45202

8310MGK
9301013

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture of three thousand one hundred twenty-five dollars ($3,125) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. The Notice of Apparent Liability is issued for your violation of Section 73.1216 of the Commission's Rules, which pertains to licensee-conducted contests.

On January 4, 1993, the Commission received a complaint concerning a contest conducted by Station KOA, Denver, Colorado. According to the complainant, the contest involved periodic drawings for prizes that included, among other things, tickets to various out-of-town Denver Broncos games. The contest was open to members of the public who deposited either an official entry form or a "non-winning" Colorado Lottery scratch game ticket in a display box at a participating 7-Eleven store. Prizes were drawn from the total cumulative entries.

The complainant alleged that tickets deposited at the 7-Eleven store at 48th and Oakland Streets prior to the drawing scheduled for December 11, 1992, were not picked up in time for the drawing, even though the complainant had spoken twice with Station KOA personnel, once on December 8 to discuss contest procedures, and once on the morning of December 11 to report that entries deposited at the 48th and Oakland Streets 7-Eleven had not yet been picked up. Complainant urged further that the woman with whom she spoke (later identified as Dawn Massop, KOA Sales Promotion Director) had promised to check into the situation and to collect the entries personally in time for the December 11 drawing should that prove necessary.

On February 10, 1993, we sent you a letter of inquiry concerning the contest. You replied on March 19, 1993, having received an extension of time. Your letter does not dispute directly any of the complainant's allegations. Rather, you offer additional information and explanations for your actions.

Collecting contest entries, you state, was the responsibility of the Southland Corporation, owner of 7-Eleven stores. In response to complainant's calls, Ms. Massop thus contacted Southland headquarters, and at Southland's suggestion, talked directly with the manager of the 48th and Oakland Streets store. The manager assured her that entry forms had been picked up, you claim. When this proved not to be the case, Ms. Massop's supervisor gave complainant the telephone number of Southland's Market Merchandise Manager and recommended a call directly to him. Your own further inquiry indicted, you state, that the store manager at the 48th and Oakland Streets 7-Eleven was new and apparently failed to realize that he had deviated from established procedures.

You urge by way of justification, that the error here was an isolated mistake. Station KOA personnel, moreover, moved quickly to investigate complainant's concerns and acted reasonably in relying on Southland's assurances of compliance with contest procedures. The store manager's mistake was regrettable, you conclude, but it was also unintentional. You note also that Southland's Market Merchandise Manager apologized to complainant and offered her tickets to a local Broncos game, a promise which has not, complainant reports in a reply of April 2, 1993, been kept.

Section 73.1216 provides that "[a] licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest and shall conduct the contest substantially as announced or advertised...." While neither the Official Rules nor the sample announcement attached to your response state specifically that entry boxes will be emptied and delivered to a central place for each drawing, this seems a logical and fair reading of the regulations, particularly in light of the cumulative nature of the drawings. The complainant understood contest procedures to operate in this manner; your replies reflect this same understanding.

Our review of the material before us suggests that Station KOA failed to meet this obligation of timely entry collection. Entries deposited at the 48th and Oakland Streets 7-Eleven simply were not picked up and made available for the December 11 drawing. In this manner, and in this instance, Station KOA failed to conduct its contest as announced and advertised.

This failure is not excused by the existence of a co-sponsor. The rules and announcement sent us present the contest as a KOA/7-Eleven venture. Tasks are not allocated publicly to one entity or the other. Under these circumstances, members of the public could reasonably hold Station KOA accountable for any and all aspects of the contest, including the entry collection process. Indeed, Station KOA staff fully accepted complainant's telephone calls, to the point even of offering personally to collect and deliver ballots. If Station mployees chose ultimately to rely upon Southland to investigate and correct reported problems, it was certainly their privilege to do so. This reliance, however reasonable, did not relieve the Station of its obligations under our rules, though.

In sum, you appear to have violated Section 73.1216 of the Commission's Rules in December, 1992, by failing to include all eligible entries in the contest. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Jacor Broadcasting of Colorado, Inc., Licensee of Radio Station KOA, is hereby advised of its apparent liability for a forfeiture of three thousand one hundred twenty-five dollars ($3,125).

The forfeiture amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on*

recon., 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under our forfeiture standards, the base amount for a violation of Section 73.1216 of the Commission's Rules is six thousand two hundred and fifty dollars ($6,250). In view of the isolated and limited nature of your violation and your prompt action in addressing it, we will reduce the forfeiture to three thousand one hundred twenty-five dollars as a recognition of good faith.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
WTMJ, Inc.
Licensee, Station WIFC(FM)
Wausau, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1993; Released: June 30, 1993

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 7 FCC Rcd 6238 (1992), imposing a forfeiture of six thousand two hundred and fifty dollars ($6,250) on WTMJ, Inc., for violation of the anti-lottery provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules, and (2) a response to the NAL filed October 20, 1992, by WTMJ.

2. The advertisements cited in the NAL concerned gaming at the Grand Royale Casino, a Sakaogon Indian tribal operation in Mole Lake, Wisconsin. Section 73.1211(c)(3) permits advertisement of gaming conducted by an Indian Tribe when it is conducted in compliance with the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*).

3. The NAL states, and WTMJ does not dispute, that with reference to the Indian Gaming Regulatory Act, conditions in the State of Wisconsin[1] permit advertisement of Class II games at the Grand Royale Casino, but not advertisement of Class III games.[2] WTMJ cites as error in the NAL its conclusion that the advertising spots aired referred to both Class II and Class III gaming and its imposition upon the licensee of responsibility for activities at the Grand Royale Casino of which it claims to have been unaware. WTMJ also faults our calculation of the forfeiture amount. We consider each of these arguments in turn.

4. By letter of October 22, 1991, to the President of the Wisconsin Broadcasters Association, we approved use of the phrase "Vegas-style excitement" in commercials for activities that were either non-lottery or in compliance with the Indian Gaming Regulatory Act. One of the advertising spots used instead the phrase "Vegas style games." WTMJ terms the NAL's refusal to consider the two phrases identical "a distinction without a difference." We cannot agree. In the context of a multi-use establishment, the phrase "Vegas-style excitement" can fairly be taken as a comprehensive reference to the entertainment, food and drink, decor, and other factors that combine to create the ambiance popularly associated with Las Vegas establishments. The phrase "Vegas style games," in contrast, is more specifically associated with casino games alone.

5. In responding to our initial letter of inquiry, the licensee claimed that it had believed the Grand Royale Casino to conduct both Class II and Class III gaming, but had learned upon investigation after receipt of our letter that it conducted only Class III games. WTMJ terms the NAL's finding of a violation under these circumstances a new and improper requirement that licensees ensure the legality of the actions of their advertisers.

6. To the extent that the licensee's argument suggests that a licensee seeking to avail itself of an exception to a general prohibition must take steps to assure itself that the exception applies, we agree with its premise.[3] Licensees may not remain ignorant of the activities they are advertising in this area, and then plead this ignorance as an excuse for violating the law. Such an approach is directly at odds with the Commission's historic placement of responsibility upon licensees for all material that they air.

7. WTMJ claims finally that the forfeiture is too large, citing in this regard the NAL's reference to the "repeated nature of the violations." Since virtually every spot announcement is broadcast more than once, it urges, this approach is arbitrary and inconsistent with our forfeiture policies. We note, however, that the forfeiture amount in fact reflects a base of twelve thousand five hundred dollars ($12,500), one six thousand two hundred fifty dollar ($6,250) forfeiture for each of the two advertisements aired, reduced by 50% in light of the licensee's good faith. This is entirely consistent with criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

8. Accordingly, WTMJ's Response to Notice of Apparent Liability IS DENIED. IT IS ORDERED, that WTMJ Inc., licensee of Station WIFC, Wausau, Wisconsin, FORFEIT to the United States the sum of six thousand two hundred fifty dollars ($6,250) for the violation of 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to the Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Com-

[1] The Indian Gaming Regulatory Act permits advertisement of Class III games conducted in accordance with State law by an Indian tribe on tribal lands, as long as a tribal-State compact is in effect. The State of Wisconsin has not, according to all information, entered into such an agreement with the Sakaogon tribe.

[2] Under the Indian Gaming Regulatory Act, the term "Class II gaming" is defined as: (1) the game of chance commonly known as bingo (and similar games); (2) card games that are explicitly authorized by, or not explicitly prohibited by, the laws of the State. The term "Class III gaming" includes all gaming that is not Class I or Class II gaming. Typically, casino games such as blackjack, roulette, poker, and slot machines are considered Class III games.

[3] It is true, as WTMJ asserts, that the Commission does not require licensees to assess the truth or fairness of the commercial advertisements they air. This is not a case of deceptive advertising, however, but one of compliance with a particular statutory provision under which exceptions to a general prohibition are explicitly dependent upon the type of gaming advertised.

mission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.115 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-172

In the Matter of

Amendment of Section 73.606(b), RM-8261
Table of Allotments,
TV Broadcast Stations.
(Cimarron, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1993; Released: June 30, 1993

Comment Date: August 23, 1993
Reply Comment Date: September 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Clear Channel Television Licenses, Inc. ("petitioner"), requesting the allotment of UHF Television Channel 23 to Cimarron, Kansas, as that community's first local television service. Petitioner provides information in support of the proposal and states its intention to apply for the channel, if allotted.[1]

2. Cimarron (population 1,491),[2] in Gray County (population 5,138), is located in southwestern Kansas, approximately 290 kilometers (180 miles) west of Wichita, Kansas.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 23 can be allotted to Cimarron, Kansas, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules provided there is a site restriction 2.7 kilometers (1.7 miles) west of the community.[3] The site restriction will prevent a short spacing to vacant Channel 21 in Dodge City, Kansas. Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Cimarron is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. We believe the public interest would be served by proposing the allotment of Channel 23 to Cimarron, Kansas, since it could provide the community with its first local TV service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cimarron, Kansas	---	23

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 23, 1993,** and reply comments on or before **September 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Bodorff
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] Petitioner is the licensee of Station KSAS(TV), Wichita, Kansas. Petitioner states that it intends to build a full power facility in Cimarron consistent with the Commission's Rules. Furthermore, it notes that the Grade B contour of the new facility at Cimarron would not overlap the Grade B contour of Station KSAS(TV), and therefore its proposal is consistent with Section 73.3555 of the Rules.

[2] Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 23 at Cimarron are 37-48-41 and 100-22-38.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-173

In the Matter of

Amendment of Section 73.606(b), RM-8262
Table of Allotments,
TV Broadcast Stations.
(Hoisington, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1993; Released: June 30, 1993

Comment Date: August 23, 1993
Reply Comment Date: September 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Clear Channel Television Licenses, Inc. ("petitioner"), requesting the allotment of UHF Television Channel 14 to Hoisington, Kansas, as that community's first local television service. Petitioner provided information in support of the proposal and states its intention to apply for the channel, if allotted.[1]

2. Hoisington (population 3,678)[2] in Barton County (population 31,343), is located in Central Kansas, approximately 150 kilometers (93 miles) northwest of Wichita, Kansas.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 14 can be allotted to Hoisington, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules without a site restriction.[3] The proposed allotment of Channel 14+ at Hoisington will require a plus offset.[4] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Hoisington is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. We believe the public interest would be served by proposing the allotment of Channel 14+ to Hoisington, Kansas, since it could provide the community with its first local TV service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hoisington, Kansas	---	14+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 23, 1993,** and reply comments on or before **September 7, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Bodorff
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

[1] Petitioner is the licensee of Station KSAS(TV), Wichita, Kansas. Because the Grade B contour of Channel 14+ at Hoisington would overlap the Grade B contour of Station KSAS(TV), petitioner proposes to construct and operate Channel 14+ as a satellite of Station KSAS(TV), consistent with Note 5 to Section 73.3555 of the Commission's Rules.

[2] Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 14+ at Hoisington are 38-31-00 and 98-46-36.

[4] "A station with a plus or minus offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-175

In the Matter of

Amendment of Section 73.202(b) RM-8264
Table of Allotments,
FM Broadcast Stations.
(Pateros, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 10, 1993; Released: June 30, 1993

Comment Date: August 23, 1993
Reply Comment Date: September 7, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Pateros Community Broadcasters ("petitioner"), proposing the allotment of Channel 300A at Pateros, Washington, as its first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 300A at Pateros, Washington, since it could provide the community with its first local aural transmission service. Channel 300A can be allotted to Pateros in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.3 kilometers (5.1 miles) west to avoid a short-spacing to Station KMBI-FM, Channel 300C, Spokane, Washington, at petitioner's requested site.[1] Since Pateros is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pateros, Washington	--	300A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 23, 1993,** and reply comments on or before **September 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300A at Pateros are North Latitude 48-03-32 and West Longitude 120-00-51.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-180

In the Matter of

Amendment of Section 73.202(b), RM-8237
Table of Allotments,
FM Broadcast Stations.
(Bowie, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 16, 1993; Released: June 30, 1993

Comment Date: August 23, 1993
Reply Comment Date: September 7, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Central Oklahoma Radio Corporation ("petitioner"), licensee of Station KFXT-FM, Sulphur, Louisiana, seeking the substitution of Channel 264A for Channel 264C3 for Station KRJT-FM at Bowie, Texas, and modification of KRJT-FM's license to specify the Class A channel.

2. Petitioner states that the Class C3 allotment at Bowie, Texas, conflicts with its own application (File No. BPH-921023IB) to upgrade its Sulphur station to Channel 265C2. Petitioner contends that Bowie Nocona Broadcasting Company, Inc. ("Bowie Nocona"), licensee of Station KRJT-FM, Bowie, Texas, has failed to implement the Class C3 upgrade for the past three years. Petitioner notes adoption of its proposal will provide an expanded service area for the Sulphur, Louisiana, station, thereby serving the public interest.

3. We believe the public interest would be served by proposing the substitution of Channel 264A for Channel 264C3 at Bowie, Texas, since the proposed substitution would enable Station KFXT-FM to expand its service area. We note that Bowie Nocona has been notified pursuant to Commission letter dated April 1, 1993, that it risks losing its C3 facilities due to its failure to file a construction permit application. To date Bowie Nocona has not filed a Form 301 to upgrade Station KRJT-FM to a Class C3 facility. Therefore, Bowie Nocona is deemed to have abandoned its interest in the Class C3 allotment. Upon termination of this proceeding, we shall modify the license of Station KRJT-FM to specify operation on Channel 264A in lieu of Channel 264C3 at Bowie, Texas. Channel 264A can be allotted to Bowie in compliance with the Commission's minimum distance separation requirements at the licensed site of Station KRJT-FM.[1]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bowie, Texas	264C3	264A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to Bowie Nocona Broadcasting Company, Inc., P.O. Box 1080, Bowie, Texas 76230 (licensee of Station KRJT-FM).

7. Interested parties may file comments on or before **August 23, 1993,** and reply comments on or before **September 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jeffrey D. Southmayd
Southmayd & Miller
1220 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] The coordinates for Channel 264A at Bowie are North Latitude 33-38-43 and West Longitude 97-49-08.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-181

In the Matter of

Amendment of Section 73.202(b), RM-8268
Table of Allotments,
FM Broadcast Stations.
(Livingston, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 16, 1993; Released: June 30, 1993

Comment Date: August 23, 1993
Reply Comment Date: September 7, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Henry Adams ("petitioner"), seeking the allotment of Channel 264C to Livingston, Montana, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application if the channel is allotted to Livingston.

2. We believe petitioner's proposal warrants consideration. Channel 264C can be allotted to Livingston, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the fact that the proposed allotment would provide additional broadcast service to Livingston, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Livingston, Montana	248C1, 264C	248C1, 264C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 23, 1993,** and reply comments on or before **September 7, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lauren A. Colby
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21705-0113

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 264C at Livingston are 45-39-45 and 110-33-37.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-475

In the Matter of

Amendment of Section 73.202(b),	RM-7280
Table of Allotments,	RM-7328
FM Broadcast Stations.	
(Dawson and Sasser, Georgia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1993; Released: June 30, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6299 (1990), issued in response to two conflicting petitions for rule making. Dawson Broadcasting Company ("DBC"), licensee of Station WAZE(FM), Channel 221A, Dawson, Georgia, requested the substitution of Channel 299A for Channel 221A at Dawson, and modification of its license to specify the new class A channel (RM-7280). Clyde and Scott/dba EME Communications ("EME") requested the allotment of Channel 299C3 to Sasser, Georgia, as that community's first local service (RM-7328). DBC and EME filed comments and reply comments. Broadcast Associates, Inc. ("BAI") filed a counterproposal requesting the allotment of Channel 221A to Columbia, Alabama, the substitution of Channel 273C3 for Channel 273A at Dothan, Alabama, the substitution of Channel 269A for Channel 271A at Graceville, Florida, substitution of Channel 236A for Channel 252A at Cordele, Georgia, the substitution of Channel 299A for Channel 221A at Dawson, Georgia, the substitution of Channel 290A for Channel 236A at Montezuma, Georgia, and the substitution of Channel 251C3 at Sasser, Georgia.[1] [2]

2. EME in its comments states that it has conducted a search for alternate channels and suggests that Channel 251A be allotted to DBC in lieu of Channel 299A in order to remove the mutual exclusivity between Dawson and Sasser. EME states that should the Commission find that Channel 251A is unavailable for use at Dawson, the Commission should base its decision on the allotment criteria in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).[3] EME states that the allotment of Channel 299A will not provide a first or second full-time aural service to Dawson, while the allotment of Channel 299C3 to Sasser will provide a first local service to that community. After the record closed, DBC and EME filed a joint request for approval of settlement agreement in which DBC agreed to apply for Channel 251A at DBC and relocate its transmitter site.[4]

3. In view of the above information, we believe the public interest would be served by allotting Channel 299C3 to Sasser, Georgia, as that community's first local transmission service. We will also substitute Channel 251A for Channel 221A at Dawson, Georgia, in order to provide Station WAZE with a 6 kilowatt Class A service. Channel 299C3 can be allotted to Sasser in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) west[5] of the community in order to avoid a short spacing to a construction permit for Station WQBX(FM), Channel 298A, Omega, Georgia, and Station WPEZ(FM), Channel 300C1, Macon, Georgia. Channel 251A can be allotted to Dawson in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.7 kilometers (3.5 miles) southwest[6] in order to avoid a short spacing to Station WDMT(FM), Channel 250A, Eufaula, Alabama, and Station WKKN, Channel 252A, Cordele, Georgia.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 16, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Dawson, Georgia	251A
Sasser, Georgia	299C3

[1] After the record closed, Emerald filed a statement for the record. Emerald's statement is now moot and will not be discussed, since its proposal was adopted on March 17, 1992. *See First Report and Order*, MM Docket No. 90-129, 6 FCC Rcd 2112 (1992).

[2] BAI's counterproposal has not been accepted in this proceeding. BAI's counterproposal was filed in an attempt to find an alternate channel to permit an upgrade on Channel 273C3 at Dothan in MM Docket No. 90-129. *See Notice of Proposed Rule Making*, 5 FCC Rcd 1753 (1990). However, the parties in this proceeding have reached an agreement to substitute Channel 251A for Channel 221A at Dawson, which in turn allows for the accommodation of the proposals in both MM Docket No. 90-129 and MM Docket 90-475. We also note that the agreement between the Dawson and Sasser proponents is preferable because it does not require disruption of the Cordele and Montezuma, Georgia, stations.

[3] The FM allotment priorities are (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are of co-equal weight.

[4] In accordance with Section 1.420(j) of the Commission's Rules, DBC states that no party has received any compensation in this agreement. Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we believe acceptance is in the public interest, because this agreement resolves conflicting issues in this proceeding.

[5] The coordinates for Channel 299C3 at Sasser are North Latitude 31-41-55 and West Longitude 84-27-13.

[6] The coordinates for Channel 251A at Dawson are North Latitude 31-44-06 and West Longitude 84-29-01.

5. The window period for filing applications for Sasser, Georgia, will open on **August 17, 1993,** and close on **September 16, 1993.**

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WAZE(FM), Dawson, Georgia, IS MODIFIED, to specify operation on Channel 251A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Leila C. Brown FOIA No. 93-28
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 1993; Released: June 24, 1993

By the Commission:

1. The Commission has before it an Application for Review filed by Leila C. Brown, a Commission employee, appealing a February 16, 1993 Freedom of Information (FOIA) decision by the Managing Director. By request dated January 26, 1993, Ms. Brown requested access to all written materials that had been provided to another Commission employee. The records in question pertained to the Commission's investigation into allegations of misconduct by the other employee and were disclosed to the other employee pursuant to requirements of the Privacy Act.

2. In denying Ms. Brown's request, the Managing Director indicated that the documents were contained in the personnel file of a Commission employee and that this file was subject to the Privacy Act, *see* 5 U.S.C. § 552a. In addition, the Managing Director determined that disclosure of the requested materials raised significant privacy interest concerns and there were no countervailing public interest considerations that would weigh in favor of disclosure. Accordingly, the Managing Director concluded that the documents were protected under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Because disclosure was not required under the FOIA, the Managing Director concluded that disclosure was prohibited by the Privacy Act, 5 U.S.C. § 552a(b). For the reasons discussed herein, we affirm the Managing Director's ruling.

DISCUSSION

3. On review, Ms. Brown asserts that "none of the information requested should be contained in an employee's Official Personnel File," and that, in any event, she has a right of access to the records under section (d)(1) of the Privacy Act, 5 U.S.C. § 552a(d)(1). Ms. Brown further argues that there are countervailing public interest considerations that favor disclosure. Specifically, Ms. Brown states that the information requested includes notes taken during conversations with Ms. Brown and other Commission employees and summaries of their oral statements. She maintains that she and other employees who supplied information have a right to know how the information was characterized and a right to respond to any allegations made by the individual subject to the investigation.

4. We first address the Privacy Act arguments raised by Ms. Brown. At the outset, we reject Ms. Brown's suggestion that the records in question are not covered by the Privacy Act. The requested documents are contained in a system of records established by the Commission pursuant to the Privacy Act and named "FCC/OMD-2, Labor and Employee Relations Case Files." As required by the Privacy Act, 5 U.S.C. § 552a(e)(4), the Commission published the most recent notice for this system of records on May 18, 1992. *See* 57 Fed. Reg. 21091, 21108-09 (1992). The Privacy Act notice describes this system as "records relating to formal and informal actions based on conduct or performance." *Id.* In particular, the system contains "materials relied on by the agency to support the proposed action; statements of witnesses; employee responses or appeals; transcripts; and agency decisions." *Id.* The records sought by Ms. Brown thus clearly fall within the scope of a Privacy Act system of records properly noticed and maintained by the Commission.

5. As noted before, Ms. Brown asserts a right of access to the records under section (d)(1) of the Privacy Act, 5 U.S.C. § 552a(d)(1). The records at issue, however, are not indexed and retrievable by Ms. Brown's name or personal identifier. Therefore, Ms. Brown cannot invoke section (d)(1) to gain access to the records. *See Baker v. Department of the Navy*, 814 F.2d 1381, 1383-84 (9th Cir.) *cert. denied*, 484 U.S. 963 (1987); *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 360-61 (3d Cir. 1985).[1]

6. The Privacy Act also forbids disclosure of this information to Ms. Brown unless the information is required to be disclosed under the FOIA. *See* 552a(b)(2). Turning therefore to the merits of Ms. Brown's FOIA request, we find that the records at issue meet the threshold requirement of Exemption 6 of the FOIA, which permits the withholding of personnel, medical, and similar files where disclosure of such records would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). The records responsive to Ms. Brown's request include original notes and summaries of witness interviews, and the response by the individual subject to the investigation. These documents are the kinds of records typically found in personnel files maintained by the agency.

7. In evaluating a request for records under Exemption 6, an agency must balance the privacy interest served by withholding the records at issue and the public interest that would be furthered by disclosing such records. *See Department of Justice v. Reporters Committee for Freedom of the Press (Reporters Committee)*, 489 U.S. 749, 762-764 (1989).[2] In this connection, case law has established that the identity of the requester or the purpose of the FOIA request are not relevant in balancing the interests involved. Rather, the balancing is based on whether the requested information will shed light on the agency's performance of its statutory duties. *See Reporters Committee*, 489 U.S. at

[1] The Privacy Act does provide access to records in accordance with routine uses previously published by the agency. *See* 5 U.S.C. § 552a(b)(3). However, we have examined the published routine uses for the system of records at issue and have found no routine use that would afford Ms. Brown access to the records requested.

[2] Although *Reporters Committee* was decided under FOIA Exemption 7(C), its legal precepts apply to the analogous provisions of Exemption 6. *See Hopkins v. Department of Hous. & Urban Dev.*, 929 F.2d 81, 87 n.5 (2d Cir. 1991); *National Ass'n of Retired Fed. Employees (NARFE) v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

772-774. Further, in balancing the privacy and public competing interests, the courts customarily have extended protection to the identities of mid- and low-level federal employees accused of misconduct and the details and results of any internal investigation into such allegations. *See Dunkelberger v. Department of Justice*, 906 F.2d 779 (D.C. Cir. 1990); *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984); *Cotton v. Adams*, 798 F. Supp. 22 (D.D.C. 1992).

8. The individual whose records are requested has a substantial privacy interest in the nondisclosure of these records, which contain allegations about incidents of misconduct. On the other hand, Ms. Brown's personal interest in knowing how the investigator characterized information supplied by witnesses and in responding to any allegations, is not a legally cognizable basis for disclosure under FOIA Exemption 6. In addition, disclosure of this mid-level employee's records would not reveal any information about the Commission's performance of its statutory duties and does not outweigh the privacy interest at stake. *See* cases in para. 7, *supra*. Therefore, we conclude that the documents are protected from disclosure under Exemption 6 of the FOIA. Accordingly, because disclosure is not required by the FOIA, the Managing Director correctly concluded that the Privacy Act prohibits the agency from affording Ms. Brown access to the records requested. *See* 5 U.S.C. § 552a(b).

10. We have considered also Ms. Brown's request that we provide an index of the documents withheld and any nonexempt portions of the records. The FOIA, however, does not require agencies to prepare indexes of withheld documents at the administrative level. *See Stimac v. Department of Justice*, 620 F. Supp. 212, 213 (D.D.C. 1985); *Safecard Service, Inc. v. SEC*, Civil No. 84-3073 (D.D.C. Apr. 21, 1986). Agencies are only required to inform the requester of the reasons for the denial of a request, the name and title of the person responsible for the denial, and the right to an administrative appeal and judicial review. *See* 5 U.S.C. § 552(a)(b)(A), 6(C). The description of the documents contained herein and our analysis of the status of the documents under the FOIA provide sufficient information about the reasons for our determination and, therefore, the preparation of an index is not necessary. We are also mindful of our duty to segregate and disclose nonexempt portions of withheld records. However, segregation is not possible when, as in this case, the FOIA request is limited to privacy-sensitive information pertaining to one identifiable individual. *See Cotton v. Adams*, 798 F. Supp. at 27 (D.D.C. 1992).

CONCLUSION

11. In view of the foregoing, the Application for Review filed by Leila C. Brown IS DENIED. Ms. Brown may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

12. The officials responsible for this action are the following Commissioners: Chairman James H. Quello, Commissioners Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-25

In the Matter of

Implementation of Section 25
of the Cable Television Consumer
Protection and Competition Act
of 1992

Direct Broadcast Satellite
Public Service Obligations

ORDER GRANTING EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: June 23, 1993; Released: June 24, 1993

Reply Comment Date: July 14, 1993

1. On March 2, 1993, the Commission released a *Notice of Proposed Rule Making* (*"Notice"*) in this proceeding, soliciting comment on the imposition of public service obligations on providers of direct broadcast satellite video programming.[1] The deadline for filing reply comments is currently June 30, 1993.

2. On June 21, 1993, a motion for extension of time for filing reply comments was filed by the Association of America's Public Television Stations ("APTS"). The motion requests that the deadline for filing reply comments be extended by two weeks to July 14, 1993.

3. APTS contends, among other things, that the extension of time is necessary to analyze the complicated issues raised in this proceeding and the numerous sets of comments that have been filed. Moreover, APTS has been and is involved in a number of other legal activities related to implementation of the 1992 Cable Act with strict participation deadlines during this comment and reply period. Also, APTS is in a unique position to represent the interests of a significant constituency in this rulemaking proceeding.

4. Although Section 1.46 of the Commission's Rules provides that extensions of time should not be routinely granted, we believe that a two week extension of time to file reply comments is warranted in light of the complexity and novelty of the issues raised in this proceeding. This brief extension of time should facilitate the development of a full and complete record on these issues and should not prejudice the parties in this proceeding.

5. Accordingly, IT IS ORDERED That the motion for extension of time filed by the Association of America's Public Television Stations IS GRANTED and that the time for filing reply comments in MM Docket 93-25 IS HEREBY EXTENDED to **July 14, 1993.**

6. This action is taken pursuant to authority found in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, and Section 0.204(b), 0.283, and 1.45-46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] 8 FCC Rcd 1589 (1993), 58 Fed. Reg. 12917 (March 8, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

U S WEST COMMUNICATIONS, INC. AND SOUTH CENTRAL UTAH TELEPHONE ASSOCIATION, INC. JOINT PETITION FOR WAIVER OF THE DEFINITION OF STUDY AREA CONTAINED IN PART 36 APPENDIX GLOSSARY, AND SECTION 61.41(c) OF THE COMMISSION'S RULES
(AAD 93-55)

Release Date: June 21, 1993

PUBLIC COMMENT INVITED

Comment Date: July 9, 1993
Reply Date: July 23, 1993

On April 16, 1993, U S West Communications, Inc. (U S West), and South Central Utah Telephone Association, Inc. (South Central) filed a joint petition for waiver of the definition of "study area" set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to change their study area boundaries to reflect the transfer of U S West's Bicknell, Loa, Hatch, Bryce Canyon, and Panguitch exchanges to South Central. In addition, South Central has filed for waiver of the Price Caps rules found at C.F.R §61.41(c) of the Commission's rules. This would allow South Central to continue to be regulated under rate of return after it acquires these five exchanges from U S West.

Parties may file comments on these petitions no later than **July 9, 1993.** Replies should be filed by **July 23, 1993.** Comments should reference AAD 93-55. A copy of each pleading should be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington D.C., 20037, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Adrian Wright at (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1993

ALASKA FEDERAL-STATE JOINT BOARD TO CONVENE A HEARING IN ANCHORAGE ALASKA ON THURSDAY, JULY 1, 1993

CC DOCKET NO. 83-1376

The Alaska Federal-State Joint Board in CC Docket 83-1376 will convene a hearing on Thursday, July 1, 1993, at 9:30 a.m. in Anchorage, Alaska (1:30 p.m. (EDT). The hearing will be held to receive testimony from the citizens of Alaska and other interested persons on the following: (1) the *Tentative Recommendation and Order Inviting Comments*, FCC 93J-1, released by the Federal-State Joint Board on May 17, 1993; (2) the implementation plan filed by Alascom, Inc. on June 7, 1993; (3) the American Telephone and Telegraph Company (AT&T) response filed on June 7, 1993; and (4) the AT&T Petition to Terminate the Joint Services Agreement (AT&T Customer Benefit Plan) filed March 31, 1993.

FCC Chairman Quello and FCC Commissioners Duggan and Barrett will participate by means of videoconference facilities in Washington, D.C. State Commissioners Susan Knowles (Alaska), Dean J. "Joe" Miller (Idaho), Bruce Hagen (North Dakota), and David Rolka (Pennsylvania) will also participate in the hearing.

The hearing will convene at the video conferencing facilities at 1049 W. 5th Ave., Anchorage, Alaska. Persons wishing to testify either in person or via audio links within the State of Alaska should contact Lorraine Kenyon, Alaska Public Utilities Commission, at (907) 276-6222. Space at the Anchorage videoconference facilities is limited. Members of the public interested in listening to the meeting may do so at the Alaska Public Utilities Commission, Public Hearing Room, Third Floor, 1016 W. 6th Avenue, Anchorage, Alaska. In Washington, D.C., the public may listen to the meeting at the FCC, Room 856, 1919 M Street, N.W. Additional information concerning this hearing may be obtained from Lorraine Kenyon, Alaska Public Utilities Commission, at (907) 276-6222 or from Rose Crellin, Common Carrier Bureau, FCC, at (202) 632-1292.

Interested persons may also provide written testimony or other comments until **July 12, 1993.** An original and five copies should be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Additional copies should be sent to the following: three copies to Peggy Reitzel, Common Carrier Bureau, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554; and one copy to ITS, Inc. the Commission's contractor for public records duplication, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Comments will be available for inspection and photoduplication in Room 239, 1919 M. Street, N.W., Washington, D.C. 20554, 9:00 AM to 4:30 PM Monday-Friday. Copies may additionally be obtained from ITS, Inc.

Parties should also send copies of filings to the following Alaska Joint Board Members and their staffs: Hon. Bruce Hagen, North Dakota Public Service Commission, State Capitol Building, Bismarck, North Dakota 58505; Hon. Susan M. Knowles, Alaska Public Utilities Commission, 1016 West 6th Avenue, Suite 400, Anchorage, Alaska 99501; Hon. Dean J. "Joe" Miller, Idaho Public Utilities Commission, 472 West Washington, Boise, Idaho 83702; Hon. David Rolka, Pennsylvania Public Utilities Commission, P.O. Box 3265, Harrisburg, Pennsylvania 17105; Lorraine Kenyon, Alaska Public Utilities Commission, 1016 West 6th Avenue, Suite 400, Anchorage, Alaska 99501; Eileen Benner, Idaho Public Utilities Commission, 472 West Washington, Boise, Idaho, 83702; Debra Kriete, Pennsylvania Public Utilities Commission, P.O. Box 3265, Harrisburg, Pennsylvania 17105; Ronald G. Choura, c/o Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan, 48910; and Rowland Curry, Texas Public Service Commission, 7800 Shoal Creek Blvd. Suite 400N, Austin, Texas 78757.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED,	File No. BPH-870710NQ

For Construction Permit
for New FM Station,
Channel 273A (102.5 MHz),
Mableton, Georgia

ORDER

Adopted: June 23, 1993; Released: July 1, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Board has before it the above-captioned comparative proceeding, including a *Supplemental Initial Decision* (*S.I.D.*) issued by Administrative Law Judge Walter C. Miller. It also has several exceptions and replies to that supplemental decision.[1]

2. Eighteen parties originally filed mutually exclusive applications for the subject frequency. It appears that only ten remained at the issuance of the *Initial Decision*, 5 FCC Rcd 2474 (ALJ 1990).[2] However, by the time of the issuance of the *S.I.D.*, only eight parties are captioned, of which (1) Voth Broadcasting, whose name remains on the caption of the *S.I.D.*, was dismissed in the *Initial Decision* for failure to prosecute, though it did file exceptions to the Initial Decision,[3] but did not file any pleadings following the *S.I.D.*; (2) nor did Mableton Broadcasting file upon the *S.I.D.* Moreover, our records reflect the formal withdrawal of counsel for three of the captioned applicants (to wit, Bolton Broadcasting, Voth, and QRW Partners), although (1) counsel for Bolton has suddenly reappeared following nearly a year's lacuna after the Board inquired about a possible settlement;[4] and (2) a "brief" was filed on behalf of QRW by one Clarence E. Dilday of Boston, MA.[5]

3. In view of the foregoing, the Board is unclear about whether certain of the captioned applicants are continuing to prosecute their applications and who is currently appearing for others in this case.

4. ACCORDINGLY, IT IS ORDERED, That the parties ARE DIRECTED TO FILE within fourteen (14) days of the release date of this *Order* (1) their notices of appearances identifying their current counsel of record; and (2) a declaration stating they are continuing to prosecute their applications. Any party failing to respond to this *Order* within the specified time shall be deemed to have no interest in further prosecution of its application and will be dismissed pursuant to 47 CFR § 73.3568(b) and 47 CFR § 1.276(f). *See generally LRB Broadcasting*, FCC 93-209, released May 5, 1993 (application dismissed for untimely notice).[6]

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[1] ALJ Miller's *S.I.D.* was issued following further evidentiary hearings on issues added pursuant to our *Memorandum Opinion and Order*, 5 FCC Rcd 6314 (Rev. Bd. 1990). Subsequent to the issuance of Judge Miller's supplemental decision, the Board informally inquired of counsel for the parties (at least those parties that appeared to be continuing their prosecution, *see infra* ¶ 2 of this text) whether a settlement of this proceeding might be forthcoming. The Board was just recently advised informally that no settlement is imminent.

[2] Yet, only nine parties were captioned in the *Initial Decision*, and eight in the *S.I.D.*

[3] *See* 5 FCC Rcd at 2476.

[4] *See* Notice of Withdrawal of Counsel (Stephen P. Yelverton) filed August 26, 1992. *See also* Notice of Appearance (Stephen P. Yelverton June 7, 1993). However, no party represented Bolton at the Oral Argument held on February 5, 1993.

[5] QRW was found to be unqualified in the *S.I.D.* after the ALJ held that William Dilday interposed a "front" and "facade" for QRW's "partnership." *See S.I.D.*, 7 FCC Rcd 4431, 4445-46 (ALJ 1992).

[6] Pre-publication copies of this order have been mailed to the personal attention of individuals connected to QRW Partners, Mableton Communications, and Voth at their last address of record herein who may be acting, respectively, as representatives of those applicants.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC
TELEPHONE COMPANIES
Complainant,

v. File No. E-93-14

BALTIMORE GAS AND
ELECTRIC COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 24, 1993; Released: July 1, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On November 17, 1992, The Bell Atlantic Telephone Companies ("Bell Atlantic") filed with the Commission the above-captioned formal complaint against Baltimore Gas and Electric Company ("BG&E"). The complaint alleged that BG&E had violated Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. § 203 by providing off-tariff interstate common carrier communications services. In accordance with Commission rules governing formal complaint proceedings, BG&E filed an answer denying the allegations.

2. Bell Atlantic and BG&E have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that they have agreed not to pursue the complaint. On June 23, 1993, Bell Atlantic and BG&E filed a joint motion to dismiss the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' joint motion to dismiss the complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,
v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-232

ORDER

Adopted: June 24, 1993; **Released: July 1, 1993**

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, LDDS Communications, Inc. (LDDS) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On May 17, 1993, however, LDDS and SWBT filed a joint motion to dismiss the complaint with prejudice stating that the parties have agreed to a settlement which disposes of all claims asserted by LDDS in the above-captioned complaint.[1]

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[2]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that LDDS's and SWBT's Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the Application for Review filed on March 7, 1991 by LDDS IS DISMISSED AS MOOT.

5. IT IS FURTHER ORDERED that the Petition for Reconsideration filed on April 14, 1993 by SWBT IS DISMISSED AS MOOT insofar as it relates to the above-captioned complaint and the Motion to Supplement Petition for Reconsideration filed on April 19, 1993 by SWBT IS DISMISSED.

6. IT IS FURTHER ORDERED that the above-captioned complaint proceeding IS DISMISSED WITH PREJUDICE and IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] On March 15, 1993, the Commission released an order resolving the above-captioned complaint and directing the defendant to pay monetary damages. Memorandum Opinion and Order, FCC 93-75, 8 FCC Rcd 1876 (1993) (*MO&O*). On April 14, 1993, SWBT filed a petition for reconsideration of the *MO&O*. LDDS and SWBT, however, have since settled all issues between them raised in the complaint, including the issue of damages. The parties now move that we dismiss with prejudice the complaint. Accordingly, since the parties have settled disputes between them raised by the complaint and the petition for reconsideration, we will dismiss the proceeding with prejudice.

[2] LDDS filed an application for review of an action holding the above-captioned complaint in abeyance. *See Order*, 6 FCC Rcd 659 (Com. Car. Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY INC.

File No. I-T-C-93-127

Application for authority to acquire and operate facilities for service between Hawaii and Mexico.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 18, 1993; **Released: July 1, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii and Mexico by GTE Hawaiian Telephone Company, Inc. (HTC).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-127 IS GRANTED, and HTC is authorized to:

a. lease from Sprint and operate one 2.048 Mbps circuit between San Luis Obispo, California and Nogales, Arizona; and

b. use said facilities in conjunction with previously authorized facilities in the HAW-5 cable and facilities furnished by its correspondent in Mexico, to provide HTC's regularly authorized services between Hawaii and Mexico.

3. IT IS FURTHER ORDERED that our authorization of HTC to provide private lines is limited to the provision of such private lines only between the United States and Mexico -- that is, private lines which originate in the United States and terminate in Mexico or which originate in Mexico and terminate in the United States. In addition, HTC may not -- and HTC's tariff must state that HTC's customers may not -- connect private lins provided over these facilities to the public switched network at either the U.S. or Mexico end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Mexico affords resale opportunities equivalent to those availabel under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending.*

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VITELCOM CELLULAR, INC. — File No. I-T-C-93-137

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 18, 1993; **Released: July 1, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by Vitelcom Cellular, Inc. (Vitelcom).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-137 IS GRANTED; and Vitelcom is authorized to provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, Virgin Islands Tele-Com's Tariff F.C.C. No. 1, Telefonica Larga Distancia de Puerto Rico's Tariff F.C.C. No. 1, Allnet's Tariff F.C.C. No. 5, between the U.S. and international points listed in those tariffs.[1]

3. IT IS FURTHER ORDERED that Vitelcom shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that Vitelcom shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that Vitelcom shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. Because Vitelcom is affiliated with the Virgin Islands Telephone Corporation (Vitelco), the local exchange carrier serving the U.S. Virgin Islands, IT IS FURTHER ORDERED that Vitelcom shall continue to comply with all terms and conditions the Commission has previously imposed upon Vitelco and its affiliates, including complying with the cost allocation rules and the plan submitted by Vitelco on August 31, 1990 for complying with the Commission's CPNI and network disclosure requirements, and any modifications required by the Commission.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] Vitelcom certifies that: a) it has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and has not agreed to enter into such agreements in the future; and b) it is not affiliated with any facilities-based carrier whose services it proposes to resell, directly or indirectly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — File No. I-T-C-93-144

Application for authority to acquire and operate facilities for service to Sweden.

ORDER AND AUTHORIZATION

Adopted: June 18, 1993; **Released: July 1, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-144 IS GRANTED, and AT&T is authorized to:

a. make available to its correspondent in Sweden, on an Indefeasible Right of User (IRU) basis, a one-half interest in 30 Minimum Assignable Units of Ownership (MAUOs)[1] in the TAT-9 cable and one Minimum Investment Unit (MIU)[2] in the TAT-10 cable;

b. acquire, on an IRU basis, a one-half-interest in and operate the equivalent of 30 MAUOs in the UK-Germany 5 and Germany-Sweden 4/5 cables to extend its capacity in TAT-9 to Sweden, and the equivalent of one MIU in the Germany-Denmark 1 cable to extend its capacity in TAT-10 to Sweden; and

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and Sweden.

3. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines is limited to the provision of such private lines only between the United States and Sweden -- that is, private lines which originate in the United States and terminate in Sweden or which originate in Sweden and terminate in the United States. In addition, AT&T may not -- and AT&T's tariff must state that AT&T's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Sweden end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Sweden affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petitions for reconsideration pending.*

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MAUO is a 64-Kilobit per second (kbps) equivalent voice channel.
[2] A MIU is thirty 64-kbps equivalent voice channels or, one 2.048 Mbps traffic stream.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-93-167

Application for authority to resell switched voice services of IDB Communications Group, Inc.

ORDER AND AUTHORIZATION

Adopted: June 18, 1993; Released: July 1, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-167 IS GRANTED, and MCI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in IDB World Communications, Inc. Tariff F.C.C. No. 1, between the U.S. and international points listed in that tariff.

3. IT IS FURTHER ORDERED that MCI shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that MCI shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that MCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services MCI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corp. File No. I-T-C-93-178

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communication between the United States and the Columbia/TDRSS Satellite System for the provision of its private line services.

ORDER AND AUTHORIZATION

Adopted: June 10, 1993; Released: July 1, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by MCI Corporation (MCI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-178 IS GRANTED, and MCI is authorized to lease and operate two (2) 36-Mhz transponders in the TDRS-174 satellite from Columbia Communications Corporation (CCC) to establish channels of communication between the earth stations located in Yacolt, Washington and at the Hickham Airforce Base, Hawaii and the TDRS-174 satellite for the provision of its private line services not interconnected to the public switched network between the United States, Japan and the Republic of Korea (South Korea).[2]

3. IT IS FURTHER ORDERED that MCI shall provide the international services authorized herein using existing earth stations in the U.S. authorized to communicate with the Columbia/TDRS satellite system.

4. IT IS FURTHER ORDERED that MCI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

5. IT IS FURTHER ORDERED that MCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that MCI shall file for separate Section 214 authorizations for the use of any additional circuits over separate satellite systems.

7. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling it or controlled by it are parties.

8. IT IS FURTHER ORDERED that MCI's authorization to provide private lines is limited to the provision of such private lines only between the United States and Japan and the United States and the Republic of Korea (South Korea)--that is, private lines which originate in the United States and terminate in either Japan or the Republic of Korea or which originate in either Japan or the Republic of Korea and terminate in the United States. In addition, MCI may not - and MCI's tariffs must state that its customers may not - connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administrations afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

9. IT IS FURTHER ORDERED that MCI shall file with the Commission copies of any operating agreement between MCI and its correspondents in Japan and the Republic of Korea within 30 days of execution and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992)(codified at 47 C.F.R. §43.51(a)(3)).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] United States obligations under Article XIV(d) of the INTELSAT agreement have been satisfied with regard to the use of the Columbia/TDRS satellite system for communications, other than public switched network services, between the United States and the Republic of Korea. *See* Letter from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (May 25, 1993).

[2] MCI's correspondents in Japan and the Republic of Korea, International Telecom Japan ("ITJ") and Dacom Korea, respectively, shall each provide at its own expense the matching half of the requested international satellite facilities, together with the connecting facilities within each correspondent's own country.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 1, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEWSPAPER ASSOCIATION OF AMERICA'S APPLICATION FOR REVIEW OF PACTEL'S STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On June 21, 1993, the Newspaper Association of America (NAA) (formerly the American Newspaper Publishers Association) filed an application for review of the Common Carrier Bureau's Memorandum Opinion and Order (MO&O) removing the structural separation requirements for Pacific Bell and Nevada Bell (Pactel). NAA argues that the Commission should review and reverse the Bureau's MO&O granting Pactel structural relief, or it should remand the MO&O for further consideration by the Bureau.

Pursuant to the *BOC Safeguards Order*, 6 FCC Rcd 7571, each Bell Operating Company (BOC) is permitted to petition the Commission for relief from the structural separation requirements if it is technically prepared to offer its ONA services, has effective federal tariffs for each of its initial interstate ONA services, and has filed state tariffs for each of its initial intrastate ONA services.

NAA argues that the Commission's non-structural safeguards fail to provide sufficient protection against anticompetitive conduct by the BOCs. In addition, NAA states that Pactel did not demonstrate its compliance with the requirements for structural relief but rather stated that it satisfied the requirements. NAA also argues that the Common Carrier Bureau was too hasty in acting on Pactel's petition. NAA states that, since petitions for review are pending before the Courts on the Commission's decision to replace structural separation with non-structural safeguards, the Commission should wait until the Courts decide this issue.

Interested parties should file comments on NAA's application for review by **July 22, 1993**, and reply comments by **August 6, 1993**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the application can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 25, 1993

Released: July 1, 1993

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Re: Affinity Network, Inc. v. AT&T,
File No. E-93-007

Gentlemen:

At a conference held on June 3, 1993, counsel for Affinity Network, Inc. (ANI) suggested that a prompt ruling on its Motion for Summary Decision, filed February 4, 1993 in the above-referenced proceeding (Motion), could serve to expedite resolution of this proceeding. Accordingly, in a telephone conference this morning, staff counsel advised the parties that ANI's Motion had been denied. This letter memorializes that ruling.

ANI seeks summary affirmative rulings on the following issues:

1. Are the Competitive Necessity Doctrine and component net revenue test applied on a service-by-service basis as opposed to a customer-by-customer basis?

2. Does the Commission's Resale Policy mandate that AT&T make Tariff 15, Competitive Pricing Plan 4 (CPP4) available to ANI?

3. Is AT&T's Tariff 15, CPP4, by its terms, available to ANI?

Under Section 202(a) of the Communications Act and Commission orders, AT&T may not unreasonably discriminate or restrict resale with regard to its tariffed interstate service offerings. Moreover, AT&T's Tariff 15 expressly provides that its competitive pricing plans, including CPP4, "are designed to respond to competitive circumstances affecting specific Customers and ... will also be available to all *similarly situated* Customers." (emphasis added)[1] The requirement that AT&T make its CPP4 23% discount offering available to all "similarly situated" customers is mandated, not only by that tariff provision, but also by Sections 201(b), 202(a) and 203(c) of the Act and, as ANI correctly notes, by the competitive necessity doctrine.[2] AT&T asserts that CPP4 was a response to an offer by MCI Telecommunications Corporation (MCI) to CBS, Inc. (CBS) which would have awarded its voice communications business to MCI if AT&T had not offered a competitively priced alternative.[3] ANI contends that a deal just as good as CPP4 is available to it from MCI and that it has a competitive offer from another unspecified interexchange carrier as well.[4] Nevertheless, after AT&T denied ANI's request for the CPP4 discount, rather than giving its business to either of those AT&T competitors, ANI continues to seek such discount from AT&T.

ANI is correct that it has established a *prima facie* case of discrimination with respect to AT&T's tariffed competitive pricing plan CPP4, and the burden of proceeding thus shifted to AT&T to show the discrimination was not undue or unreasonable. AT&T asserts that the reasons it denied CPP4 to ANI were because ANI was not similarly situated to CBS and other customers of CPP4 and positive revenues would not have been generated.[5] The net revenue test entails projections of revenues and assumptions about demand, costs and revenues.[6] Such projections and assumptions are subject to challenge[7] and have been challenged by ANI. ANI contends that the Competitive Necessity Doctrine's net revenue test may not be applied on a customer-by-customer basis, as AT&T has done here, but "must be applied on a service-by-service basis."[8] We disagree. It is not unreasonably discriminatory to distinguish between customers that otherwise are similarly situated if the competitive necessity standard, including its net revenue test component, is satisfied. Courts have recognized that the sufficiency in a given instance of any proffered justification by the defendant carrier is, by nature, "a fact-intensive inquiry ... well-suited to case-by-case adjudication in the complaint process."[9] The principal issue in this case, *i.e.*, whether ANI was entitled to the CPP4 discount, is dependent on whether ANI was similarly situated to CBS and AT&T's other CPP4 customers and whether the net revenue standard would have been satisfied if CPP4 had been provided to ANI. Such issues are vigorously contested mixed factual/legal issues, and not purely legal questions

[1] *See* Opposition of American Telephone and Telegraph Company to Motion for Summary Decision, filed February 18, 1993 (Opposition) at 3.
[2] Motion at 7.
[3] Opposition at 2.
[4] Reply to Opposition to Motion for Summary Decision, filed March 5, 1993 (Reply) at 8.
[5] Opposition at 3-4. ANI asserts that AT&T failed to adequately support its Opposition in accordance with the requirement of Section 1.251(b) of the Rules. Reply at 5, 22-23. However, that section is contained in Subpart B of Part 1 of the Commission's Rules which is applicable to certain cases that, unlike the instant proceeding, "have been designated for hearing." 47 C.F.R. § 1.201.
[6] *See* Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, 59 R.R.2d 70, 80 (1985) (Net revenue standard requires reliance upon projections).
[7] *Id.* at 81.
[8] Reply, filed December 30, 1992, at 20.
[9] *See* Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5903 (Carrier's burden to justify that discrimination was reasonable is, by nature, a fact-intensive inquiry).

that properly may be resolved by summary decision.[10] We cannot conclude that ANI's Motion is based on the uncontested factual predicate that is a prerequisite for issuance of a summary decision. Accordingly, we conclude that ANI's Motion must be and, hereby, is denied.[11]

So ordered.

This interlocutory ruling is issued pursuant to Section 4(i) and Section 208 of the Communications Act, 47 U.S.C. §§ 154(i), 208, and authority delegated in Section 0.291 of the Commission's Rules. 47 C.F.R. § 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

[10] *See* 47 C.F.R. § 1.251(d) (Summary decision requires showing that no genuine issue as to material fact exits and that party otherwise is enti tled to summary decision); Summary Decision Procedures, 24 R.R. 2d 1715, (1972).

[11] In reaching this decision, we have not considered Goldman v. State Bar, 570 P.2d 463 (1970) and AT&T's references thereto. Nor do we reach motions to strike such references, filed by ANI, including its Motion to Strike and for Sanctions, filed on March 5, 1993. Should the credibility of ANI's president, Samuel P. Delug, or any other principals of either party be determined to be of decisional significance, we will authorize the taking of depositions of such person or persons and/or designate the matter for hearing before an Administrative Law Judge.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-207

In re Applications of

DIXIE BROADCASTING, INC. — File Nos. BR-881201XN, BRH-881201XO

For Renewal of Licenses of
Stations WHOS(AM)/WDRM(FM)
Decatur, Alabama

Appearances

Thomas Schattenfield, Esquire, and *Gerald P. McCartin, Esquire,* on behalf of Dixie Broadcasting, Inc., and *James W. Shook, Esquire,* and *Gary P. Schonman, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: June 22, 1993; Released: July 7, 1993

PRELIMINARY STATEMENT

1. By *Hearing Designation Order,* 7 FCC Rcd 5638 (1992) (*"HDO"*), the Commission designated for hearing the above-captioned applications of Dixie Broadcasting, Inc. ("DBI"), for renewal of licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama ("the Stations"). The following issues were specified:

> (1) To determine whether the licensee of Stations WHOS(AM)/WDRM(FM) made misrepresentations of fact or was lacking in candor and violated Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015, with regard to the stations' EEO program and documents submitted in support thereof;
>
> (2) To determine the extent to which the licensee of Stations WHOS(AM)/WDRM(FM) complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080(b);
>
> (3) To determine whether, in light of the evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

(*HDO* at para. 15.) In accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence and the burden of proof with respect to all of the issues were placed on DBI. (*HDO* at para. 16.)

2. The *HDO* further stated that if it is determined that the hearing record does not warrant denial of the above-captioned renewal applications, it shall also be determined if DBI has willfully or repeatedly violated Section 73.1015 of the Commission's Rules (submitting truthful written statements and responses to the Commission) and, if so, whether a monetary forfeiture should be imposed on DBI in an amount up to $50,000. (*HDO* at para. 20.) The *HDO* did not provide for a forfeiture contingency under the EEO Program Issue (Issue 2).

3. A prehearing conference in this proceeding was held on October 21, 1992. Hearings were held in Washington, D.C., on February 17, 23, 24, 25 and 26, 1993, and on March 1 and 2, 1993. The record was closed on March 2, 1993. (Tr. 819; *Order,* FCC 93M-89, released March 5, 1993.)

4. Proposed findings of fact and conclusions of law were filed by both DBI and the Mass Media Bureau ("Bureau") on April 30, 1993. Reply findings were filed by DBI on May 14, 1993.

FINDINGS OF FACT

Background

5. On December 1, 1988, DBI filed applications for the renewal of the licenses of the Stations. On March 1, 1989, a Petition to Deny the renewal applications was filed by Region V of the NAACP and the National Black Media Coalition (the "Petition"). (MMB Ex. 2.) DBI filed an Opposition to Petition to Deny (the "Opposition") on April 14, 1989. (MMB Ex. 4, pp. 2-34.) Thereafter, between July 1989 and February 1992, the Commission conducted an investigation into the EEO practices of the Stations in accordance with *Bilingual-Bicultural Coalition on the Mass Media, Inc.* v. *FCC,* 595 F. 2d 621 (D.C. Cir. 1978) (*"Bilingual"*). The investigation consisted of a series of written and oral inquiries to DBI and responses thereto from DBI. On February 3, 1992, DBI and the NAACP filed a Joint Request for Approval of Settlement Agreement based upon an agreement entered into between them on January 22, 1992, resolving the allegations in the Petition. (DBI Ex. 5A, pp. 16-23.) The Joint Request was granted by the Commission, and the NAACP was allowed to withdraw the Petition against the Stations. (*HDO* at paras. 2 and 19.)

6. The Stations are a family-run business. J. Mack Bramlett ("Mr. Bramlett") has worked at the Stations full time since 1962, when he took his first job out of school as the Stations' Chief Engineer. Since 1976, Mr. Bramlett has been the full time General Manager of the Stations, and Vice President, director and 10 percent voting stockholder of DBI. As such, Mr. Bramlett has had supervisory responsibility over all facets of the Stations' day-to-day operations, including hiring and firing, programming, engineering, sales, and compliance with FCC rules and regulations, including those pertaining to EEO. During the period from 1982 to February 1989 (the "License Period"), Mr. Bramlett oversaw the operation of the Stations himself. There were no separate department heads, other than a Sales Manager and nighttime Program Director, Nathan W. Tate, Sr. ("Mr. Tate"), in 1982 and 1983, and a National Sales Manager, Mark Goodwin, starting in the fall of 1986. Mr. Bramlett devoted most of his waking hours to this task and rarely took vacations. (DBI Ex. 1, p. 1; DBI Ex. 3, pp. 26, 32-33.)

7. Mr. Bramlett graduated from high school and went on to DeVries Technical Institute, receiving a certificate in electronics in 1961. He has held a First Class Radiotelephone Operator's License from the FCC since 1961. While Mr. Bramlett has worked continuously at the Stations since 1962, he has held other broadcast and nonbroadcast positions and participated in business ventures during this period. In the early 1960's, Mr. Bramlett provided maintenance and emergency services to other broadcast facilities on a contract basis. In the mid-1970's, Mr. Bramlett was the station manager of WYUR(TV) in Huntsville, Alabama. Mr. Bramlett formed his own engineering and electronics company, Bramlett Engineering (later changed to Bramlett Electronics), for a few years in the mid-1980's and participated as a passive investor in a mining venture. Bramlett Engineering designed and manufactured traffic control systems. For two to three years in the late 1970's Mr. Bramlett organized and had an interest in a local bank and held the title Chairman of the Board. However, the bank's president and compliance officer were responsible for ensuring compliance with banking laws. (Tr. 296-301, 652.)

8. Mr. Bramlett's wife, Rebecca B. Bramlett ("Mrs. Bramlett"), worked at the Stations from 1978 until 1983 on a part-time basis, and from 1983 until June 1991 on a full-time basis, as her husband's assistant, handling bookkeeping and payroll duties, aiding in the preparation of the Stations' annual employment reports and the renewal applications and otherwise helping her husband as requested. (DBI Ex. 1, pp. 1-2; DBI Ex. 3, pp. 5-8; Tr. 497-99.) Mr. Bramlett's son, Timothy, also worked at the Stations as a full time announcer from August 1986 through August 1989 and his son, Jim, has worked at the Stations since 1988. Other Bramlett children, and a daughter-in-law, have worked at the Stations as well. (DBI Ex. 1, p. 2.)

9. The Stations have a clean record over the last 20 years, that is, there have been no violations of the FCC's rules or policies during that time period. (Tr. 817.)

10. Beginning sometime in 1984 or 1985, the Stations' communications lawyer was Daniel F. Van Horn of the law firm of Arent Fox Kintner Plotkin & Kahn ("Arent Fox"). Mr. Van Horn commenced employment with Arent Fox as an associate in 1979 and became a partner on January 1, 1986. He practiced communications law and dealt with EEO matters throughout his tenure at Arent Fox, and worked in non-communications areas as well. Mr. Van Horn left Arent Fox in April 1992 and has been an Assistant United States Attorney for the District of Columbia since May 11, 1992. (DBI Ex. 4, pp. 3-6, 8-9.) Commencing in early 1989, Susan A. Marshall, a senior attorney at Arent Fox, also worked on DBI matters under Mr. Van Horn's supervision, primarily with respect to the *Bilingual* inquiry and the preparation of the Opposition. The Opposition was one of the first responses to a petition to deny a broadcast license that Ms. Marshall worked on, although she worked on similar pleadings for other clients at around the same time. Ms. Marshall became associated with Arent Fox in 1978. She practiced communications law and dealt with EEO matters involving broadcast clients. (DBI Ex. 2, p. 1; Tr. 132-33.)

Issue 2 -- EEO Program Issue

11. The Stations are licensed to Decatur, Alabama, which is located in Morgan County and is not a part of any Metropolitan Statistical Area ("MSA").[1] The relevant work force in evaluating the Stations' employment profile during the License Period was, therefore, Morgan County. According to 1980 United States Census data, the civilian labor force in Morgan County was 39.8 percent female and 7.4 percent Black, with other racial minorities represented in statistically insignificant numbers. (MMB Ex. 4, p. 10.)

12. DBI hired a total of 140 individuals to work at the Stations during the License Period. Eighty-three of these hires were considered by DBI to be "employees" for FCC purposes. (MMB Ex. 11, pp. 2, 5-6.) DBI did not consider the remaining 57 people to be "employees." They included 21 individuals hired on a permanent basis who were asked to leave their employment after a 60 to 90-day probationary period because they were found to be unqualified for the positions for which they were hired, and 36 individuals hired as independent contractors on a purely temporary or "fill-in" basis who were not hired to work on a permanent basis. (*Id.* at pp. 3, 8-9.) The FCC, however, held that the 21 probationary employees should be deemed "employees" for FCC purposes. Therefore, there were 104 "employees" hired by DBI during the License Period. (*HDO* at para. 12 and note 10.)

13. Nine of the 140 (6.43 percent) individuals hired by DBI during the License Period were Black. Eight of the 104 (7.69 percent) "employee" hires were Black. All Blacks were hired for upper-four positions. (MMB Ex. 12, pp. 5-6.) During the License Period, Mr. Bramlett also offered upper-four positions at the Stations to three Blacks, and offered a promotion to one Black, Mr. Tate, from Sales Manager to General Manager. (DBI Ex. 1, p. 5; MMB Ex. 4, pp. 11-12, 15; Tr. 365, 782-83.)

14. Mr. Bramlett was responsible for establishing and implementing the Stations' EEO Program during the License Period. The Stations' EEO policy was informal. It was implemented by Mr. Bramlett so there were no formal procedures for others to follow. During the License Period, Mr. Bramlett did not have a sophisticated understanding of what DBI's EEO obligations were as a Commission licensee. (DBI Ex. 1, p. 2.) He was not well versed in the detailed procedures required by the Commission's rules. Throughout the License Period, however, Mr. Bramlett made an effort to obtain minority applicants and to employ minorities, and was careful to be nondiscriminatory with respect to job openings. Mr. Bramlett testified that this was not difficult because he does not discriminate and never has. Recruitment sources relied upon throughout the License Period on an irregular basis included Broadcasting Magazine, Radio and Records, Decatur Daily, Huntsville Times, Speaking Out News, University of Alabama, Alabama A&M College, National Career College, Oakwood College, Manpower, Inc., local Black leaders, and employee referrals. Mr. Bramlett believed that his efforts, coupled with the results they produced, satisfied DBI's EEO obligations. (DBI Ex. 1, pp. 2-3; Tr. 325-26, 337, 347, 365, 385, 412, 416.)

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[1] In 1988, a new MSA was created by Congress consisting of Morgan County and part of adjacent Lawrence County. This MSA was not created by the U. S. Census Bureau, however, and was therefore not reflected in U.S. Census data. Because the FCC relies on the U.S. Census as the source of its labor force data, DBI also relied on U.S. Census data and thus utilized Morgan County as its frame of reference for local civilian work force data. (MMB Ex. 4, p. 10.)

15. DBI did not maintain complete records of the Stations' recruitment efforts. DBI did retain certain job applications of minorities and applications for certain positions at the Stations, mostly sales related, for the period 1986 to 1988. As a rule, job applications were kept for 6 to 12 months before being discarded and, with a few exceptions, no written record was maintained as to the race of job applicants. (DBI Ex. 1, p. 3; Tr. 345, 388-89, 412.)

16. In the early part of the License Period, from 1982 to the beginning of 1986, WDRM(FM) had a small coverage area serving a population of approximately 90,000 in Decatur and Morgan County. It was not a desirable place to work, especially for experienced radio people, because DBI was not making any money and the wages were low. Decatur and Huntsville, a larger municipality approximately 25 miles away, were two different markets. The going hourly rate for employees at radio stations was approximately $3.25 in Decatur and approximately $4.00 in Huntsville. (DBI Ex. 1, p. 3.)

17. From September 1982 to September 1983, WDRM(FM) operated with an "urban format," one which was designed to attract minority listeners. In August 1982, in anticipation of this change, Mr. Bramlett hired Mr. Tate, an experienced Black broadcaster. Mr. Tate was given the titles of Program Director and Sales Manager. (DBI Ex. 1, pp. 3, 5; DBI Ex. 19; Tr. 327-28.)

18. In April 1983, after only eight months, Mr. Tate left DBI to start a fast-food business. (Tr. 261, 781, 784.) Absent Mr. Tate's guidance, the urban format lost momentum and, in September 1983, was discontinued. (Tr. 360.) During the approximately one-year period that WDRM(FM) utilized an urban format, DBI hired six minority individuals, in addition to Mr. Tate. Mr. Tate solicited the personnel for the urban format and recommended them to Mr. Bramlett. (MMB Ex. 12, p. 5; DBI Ex. 4, pp. 12-14; Tr. 342-47, 776.) All of the minority employees who were hired during the urban format period voluntarily left DBI either before or shortly after the format on WDRM(FM) was changed to country music on a full-time basis. (MMB Ex. 12, p. 5.) At the same time, WHOS(AM), which had been operating with a country-music format in 1982, changed to a gospel format. (Tr. 360.)

19. During the period 1982 to 1986, most job openings for on-air positions at the Stations presented a crisis situation. Openings needed to be filled immediately because DBI was unable to maintain a staff large enough to fill vacancies while a search was conducted for a replacement. When an announcer left the station, a "warm body" was needed immediately to fill the next shift. Replacements were usually found from an ever-changing group of people who regularly contacted the Stations to ascertain whether there were any job openings, or Mr. Bramlett would just grab someone off the street. In either case, due to the nature of the Stations and the minimal wages DBI could afford to pay, the replacement was usually inexperienced in radio or announcing. Such a situation sometimes resulted in the replacement leaving on his or her own accord in short order when it became apparent that the person was unable to do the job. Many of these replacements were hired on a temporary fill-in basis. From the period 1982 through the end of 1985, 23 of the "fill-in" hires were for announcer positions and 7 of the "probationary" hires were for announcer positions. On occasion, in the early part of the License Period, newspaper advertisements were run announcing job openings, but this was the exception rather than the rule. (DBI Ex. 1, pp. 3-4; Tr. 335-37; MMB Ex. 12, pp. 5-6.)

20. During the early part of the License Period, recruitment of salespersons and other staff persons, other than announcers, was mostly accomplished through networking and referrals from station personnel, although newspaper advertisements and other notices were used as well. (DBI Ex. 1, p. 4.) Due to the number of job applicants available through the networking process, Mr. Bramlett could have hired employees solely out of this applicant pool. Nonetheless, in those non-emergency situations where he was given sufficient notice by departing employees, he solicited job applicants from other recruitment sources, such as Calhoun College, in order to fulfill what he understood his EEO obligation to be. For example, Carla Snell, a Black female, was referred by Calhoun College and hired by DBI as a news reporter. (Tr. 331-34, 335-37.)

21. Mr. Bramlett sought out minorities from the minority community based on networking efforts and his personal knowledge. As discussed above, in August 1982 Mr. Bramlett hired Mr. Tate, a Black male who was a friend of his and well known in the local Black community, as the Stations' Sales Manager and nighttime Program Director. When Mr. Tate was preparing to leave the Stations in 1983, Mr. Bramlett offered him the General Manager's position, which he declined. During Mr. Tate's tenure at the Stations, word of job openings was circulated by him throughout the Black community. Mr. Tate referred Bruce E. Hill and Ricky Patton in 1982 and Willie Acklin in 1983, all of whom were Black males hired by the Stations. Mr. Tate also referred Gary Harris, a Black male who did part-time production work at the Stations in 1982 or 1983. From the time Mr. Tate left the Stations in 1983, through 1988, Mr. Bramlett contacted him to solicit minority referrals to work at the Stations and Mr. Tate in fact referred potential employees in response to Mr. Bramlett's requests. (DBI Ex. 1, pp. 4-5; DBI Ex. 8, p. 1; DBI Ex. 19, p. 1; Tr. 331, 342-43, 784-87, 790, 792-94, 803.)

22. Although Mr. Bramlett claimed that DBI's EEO program remained effective in terms of recruitment efforts during the period from September 1983 to July 1986, he conceded that it was not effective in terms of the number of minorities who were hired during that time. Indeed, DBI hired no minorities in any capacity, either full-time or part-time, during the nearly three-year period following the change in format on WDRM(FM) from urban to country music. (DBI Ex. 12, pp. 5, 8; Tr. 365-66.) By contrast, 37 persons, all white, joined DBI during this time in a variety of professional, managerial, clerical, and sales positions. (MMB Ex. 12, pp. 5, 8.) This number included 29 persons identified as "hires" (MMB Ex. 12, p. 5) as well as 8 others identified as "trainees" (*id.* at p. 8). Mr. Bramlett blamed the lack of minority hires from 1983 to 1986 on DBI's inability to find qualified people. (Tr. 366.)

23. Mr. Bramlett believed the Stations' EEO program improved beginning in 1986. The impetus for this improvement was an upgrade of the FM Station's facilities through an increase in antenna height and a relocation of its transmitter site closer to Huntsville in January 1986. Because of these changes, the FM station's signal covered three counties and approximately 350,000 people and became better known and a more desirable place to work. As a result of the FM station's expanded coverage area and new-found appeal, job advertisements were placed in

Huntsville newspapers more often, including a local Black publication, job announcements were sent to Alabama A&M, a Black college, and better results, as evidenced by increased minority applicants and a better quality of minority applicants, were obtained. Prior to this time, recruitment efforts during the License Period had not as a rule extended to Huntsville because it was a different market, the Stations were not well known there, and Huntsville residents were unlikely to work in Decatur. (DBI Ex. 1, p. 5; Tr. 378, 384, 389-94.)

24. Another by-product of the Stations' enhanced image was better pay, with a resultant decrease in job turnover and an improvement in the quality and dedication of the staff. Because existing staff or on-call fill-in workers were increasingly available to fill vacancies on a temporary basis, the Stations were better able to keep vacancies open over a longer period of time while a less hurried search was undertaken for qualified applicants. There was time to utilize a "hiring window." (DBI Ex. 1, p. 6.) From 1986 through the end of the License Period there were virtually no minority "walk-in" or "networking" applicants. Rather, minority applicants were obtained as a result of the Stations' recruitment efforts. (Tr. 385.)

25. In an attempt to take advantage of WDRM(FM)'s expanded coverage, DBI opened a Huntsville sales office. In August 1986, Dixie hired its first minority employee in nearly three years, Gwen Stephenson. However, Ms. Stephenson left DBI's employ seven months later, in March 1987, when DBI closed its Huntsville office. At that time, Ms. Stephenson was offered a position in DBI's Decatur office but declined for personal reasons. (MMB Ex. 4, p. 14; MMB Ex. 12, p. 5.) DBI did not hire another minority until February 1989. (MMB Ex. 12, p. 6.) During the 30-month period from August 1986 to February 1989, 37 persons, all white, joined the Stations in a variety of professional, managerial, technical, clerical, and sales positions. (MMB Ex. 12, pp. 6, 8-9.) This number included 31 "hires" (MMB Ex. 12, p. 6) and 6 "trainees" (*id.* at pp. 8-9).

26. Mr. Bramlett evaluated the effectiveness of the Stations' EEO program on an ongoing informal basis throughout the License Period. He judged the effectiveness of his EEO efforts by whether or not minority applicants were produced. Mr. Bramlett believed the Stations' EEO program was very effective because of its results, namely, DBI hired a number of Blacks in a community where, to his knowledge, few if any Blacks were ever hired by non-minority stations. (DBI Ex. 1, p. 6; Tr. 347-51, 365-66, 385.)

27. During the License Period, Mr. Bramlett read the trade press and perhaps an Arent Fox memo or two regarding EEO obligations. He found counsel's instructions too complicated to follow. He did not ask communications counsel, the National Association of Broadcasters, or the Alabama Broadcasters Association how to implement a more formal EEO program, nor did he attend any EEO seminars. On or about the time of the filing of the renewal applications, Mr. Bramlett did briefly discuss with Mr. Van Horn in general terms the need to implement a more formalized program. As a result of this conversation, Mr. Bramlett in January 1989 ordered from the National Association of Broadcasters its Legal Guide and certain EEO materials. Mr. Bramlett did not remember whether the Stations' formal EEO program was implemented before or after the NAACP's Petition to Deny was filed. (DBI Ex. 1, pp. 6-7; Tr. 410-11.)

28. Except for 1982, the Annual Employment Reports (FCC Form 395) during the License Period were prepared in draft form by Mrs. Bramlett and reviewed by Mr. Bramlett. In preparing the drafts, Mrs. Bramlett would review the payroll records for the two-week period covered by the report in question, prepare a list of employees during that period, categorize those employees as best she could in accordance with the Annual Employment Report's instructions, and then show the draft report to her husband. In the earlier part of the License Period, the reports were then typed up, signed, and mailed to the Commission. After Arent Fox began representing DBI, the executed reports were usually sent to Mr. Van Horn for his review before they were filed. (DBI Ex. 1, p. 7; DBI Ex. 3, pp. 27-30; Tr. 400-01.)

Issue 1 -- Misrepresentation/Lack of Candor Issue

Renewal Applications

29. On December 1, 1988, the above captioned applications for renewal of license of the Stations were filed with the Commission. Attached to the renewal applications was DBI's Broadcast Equal Employment Opportunity Program Report (FCC Form 396), dated November 23, 1988. The renewal applications, including the Form 396, were prepared by Mr. and Mrs. Bramlett and transmitted to Mr. Van Horn for filing. (DBI Ex. 1, pp. 7-8.)

30. The Form 396 reflected, *inter alia*, that there were 16 total hires during the period from November 1, 1987, to November 2, 1988 (the "Reporting Year"), that two of these hires were for positions in the upper-four job categories, and that none of these hires was a minority. The Form 396 further indicated that DBI had received no minority referrals during the Reporting Year from advertisements or from any of the educational institutions that it contacted, and that DBI had not contacted any minority organizations. (MMB Ex. 1, pp. 3-4.) The recruitment information in the Form 396 was based solely on recollection because DBI had not maintained extensive records of its recruitment efforts. (DBI Ex. 1, p. 7; Tr. 401-02.)

31. On December 7, 1988, Mr. Van Horn sent Mr. Bramlett a letter memorializing a conversation they had about DBI's affirmative action program. Mr. Van Horn stated in the letter that he would not be surprised if the Commission were to question DBI's program because of the absence of minorities on the staff and the apparent absence of substantial outreach efforts to attract minority applicants. Mr. Van Horn urged Mr. Bramlett to compile mitigating information and develop a plan so that the Stations would be more affirmative in their future recruitment efforts. (MMB Ex. 16.)

32. Mr. Bramlett was not "overly concerned" with Mr. Van Horn's advice at the time because he believed DBI had "a good EEO program." (Tr. 408.) Nevertheless, in January 1989, in direct response to Mr. Van Horn's letter, Mr. Bramlett ordered "A Broadcasters EEO Handbook" from the National Association of Broadcasters and thereafter formalized the Stations' EEO procedures in accordance with the handbook. (DBI Ex. 1, p. 6; Tr. 411.)

Petition to Deny and DBI's Opposition

33. As noted earlier, a Petition to Deny the Stations' renewal applications was filed on March 1, 1989. The petitioners alleged, based upon a review of the Stations'

Annual Employment Reports (FCC Form 395) and the Form 396, that the Stations failed to employ any minorities and failed to implement an adequate EEO program during the license term. The petitioners therefore urged the Commission to conduct a *Bilingual* investigation and, if need be, a hearing "to determine whether the licensee discriminates against minorities or otherwise violates the EEO rule." (MMB Ex. 2, p. 6.)

34. Mr. Bramlett learned of the filing of the Petition from Mr. Van Horn, and reacted viscerally. Mr. Bramlett understood the Petition to allege that he was a racist and guilty of discrimination. He was horrified, surprised, hurt, and angry. (DBI Ex. 1, p. 8; DBI Ex. 4, pp. 31-32; Tr. 184-85, 421-27, 540.) In Mr. Bramlett's mind, he had never discriminated against anyone because of race or anything else. His only goal in hiring employees at the Stations was to find talented workers regardless of race. (DBI Ex. 1, pp. 8-9.) In his own mind, Mr. Bramlett believed the Stations' EEO program was very effective because he had never discriminated against anyone and the Stations had employed many minorities. He set out immediately to gather evidence to prove that the Stations had employed minorities during the License Period. Mr. Bramlett, his wife, his son, Jim, and Mark Goodwin, the Stations' National Sales Manager since 1986, met to search their collective memory and the few records available to identify minority hires during the License Period. Mr. and Mrs. Bramlett separately devoted a substantial amount of time and effort to this issue over the next few days both at work and at home.

35. Mr. Van Horn introduced Mr. Bramlett to Ms. Marshall by telephone in connection with her preparation of an Opposition to the Petition to Deny. (Tr. 134-35, 431.) Ms. Marshall initially familiarized herself with DBI by examining Mr. Van Horn's DBI file. She also reviewed DBI's 1988 renewal applications and Form 395's for the License Period. (Tr. 138.)

36. Ms. Marshall discussed the Petition with Mr. Bramlett. Mr. Bramlett told her that DBI had in fact interviewed and hired minorities during the License Period. (Tr. 143.) Ms. Marshall asked Mr. Bramlett to compile information about the *minority* persons whom DBI had employed during the License Period, and this became Mr. Bramlett's objective. (Tr. 430-32.)

37. On March 17, 1989, Mr. Bramlett telecopied to Mr. Horn a three-page factual recitation concerning the Stations' License Period minority hiring. (DBI Ex. 1, pp. 9-10 and Att. 2; DBI Ex. 2, p. 2 and Att. 1; Tr. 433-34.) Most of the information was derived from recollection. (Tr. 434-37.) During the course of amassing the information, Mr. Bramlett discovered that the representation in DBI's Form 396 about having 16 total hires during the Reporting Year was incorrect. During the Reporting Year, DBI had in fact hired 12 persons and 10, not 2, of those 12 hires were for positions in the upper-four job categories. (DBI Ex. 1, p. 8; Tr. 153, 438-39.) Mr. Bramlett also discovered that DBI had failed to report the presence of minority employees in its 1983 and 1987 Form 395's. (Tr. 424-25.)

38. Mr. Bramlett did not recall receiving any specific instructions from Ms. Marshall or Mr. Van Horn in connection with the preparation of the Opposition. He was sure he informed Ms. Marshall that DBI had in fact hired minorities during the License Period and he understood his task was to provide information describing these hires. (Tr. 431-32, 447-48.) Ms. Marshall recalled focusing with Mr. Bramlett on refuting the allegations in the Petition concerning the absence of minority hires and the recruitment sources used in the Reporting Year. She did not recall discussing with Mr. Bramlett before the Opposition was filed the possible outcome of the petition to deny process or the possibility that sanctions could be imposed on DBI even though it had minority hires. (Tr. 143-45.)

39. DBI's Opposition was drafted by Ms. Marshall and filed with the Commission on April 14, 1989. The factual portion of the Opposition, paragraphs 4 through 17, was based upon information contained in the Stations' Annual Employment Reports, the Form 396, and minority hiring information supplied by Mr. Bramlett, as supplemented by him in telephone conversations with Ms. Marshall. (MMB Ex. 4, pp. 2-34; DBI Ex. 2, p. 2; Tr. 134-39, 143.) The remainder of the Opposition, the sections entitled "Introduction" and "Conclusion," were prepared by Ms. Marshall based upon the facts set forth in paragraphs 4 through 17 without any further input from or discussion with Mr. Bramlett. (DBI Ex. 1, p. 10; DBI Ex. 2, p. 2.) Ms. Marshall did not ask Mr. Bramlett for documentation to support the information he had supplied. She understood in a general fashion that the minority hiring information supplied by Mr. Bramlett was based in part upon records (the nature of which she did not know) and in part upon recollection. (Tr. 187-88.) At the time of the filing of the Opposition, Ms. Marshall had no understanding as to the total number of hires during the License Period. She concentrated solely on refuting the specific allegations of the Petition. (Tr. 183-84.) Ms. Marshall did not remember reviewing the EEO portion of DBI's 1981 renewal applications (MMB Ex. 17) in preparing the Opposition. She viewed the EEO information in the 1981 renewal applications as a description of DBI's past performance, not as a proposal for the future. (Tr. 139-41.) A draft of the Opposition was first reviewed and edited in a nonsubstantive manner by Mr. Van Horn, then forwarded to Mr. Bramlett for his review. (DBI Ex. 2, p. 2; DBI Ex. 4, pp. 24-25.)

40. Attached to the Opposition as Exhibit C was a "Statement" signed by Mr. Bramlett under penalty of perjury on April 14, 1989, which read in pertinent part:

> I have read the foregoing "Opposition to Petition to Deny" and all of the exhibits attached thereto and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were gathered and supplied by me and my staff and are accurate and complete.

(MMB Ex. 4, p. 33; MMB Ex. 5, p. 7; Tr. 443-44.) The facts Mr. Bramlett was referring to in this portion of his Statement were the facts set forth in paragraphs 4 through 17 of the Opposition. He had no input with respect to the balance of the Opposition, which he considered to be the legal argument of his attorneys upon whom he relied to advocate DBI's position before the FCC. (DBI Ex. 1, p. 10.)

41. In its Opposition, DBI discussed its minority recruitment efforts and overall hiring record during the Reporting Year and thereafter through February 1989 (MMB Ex. 4, pp. 8-12), and its minority recruitment efforts and minority hiring record during the balance of the License Period (*id.* at pp. 12-16). In doing so, DBI corrected certain inaccuracies in earlier EEO-related FCC filings. Specifically, DBI noted that there were 12 hires during the Reporting Year, not 16 as had been reported in the Form

396. Four persons who had worked at the Stations as independent contractors, not employees, were improperly included in the "new hire" total. (*Id.* at p. 9, note 5.) This mistake was discovered by Mr. Bramlett in the course of the preparation of the Opposition. (DBI Ex. 1, p. 11; DBI Ex. 2, p. 2; Tr. 153-54.) DBI also noted that three minority employees had been omitted by oversight from the Stations' 1983 Annual Employment Report and that a fourth minority employee had been omitted from the 1987 Annual Employment Report because the Report, which was not prepared correctly, failed to provide the requisite racial breakdown. (MMB Ex. 4, pp. 15-16, note 10.) These discrepancies were discovered by Ms. Marshall when she compared the minority hiring information supplied by Mr. Bramlett with the Stations' Annual Employment Reports. The explanations for the discrepancies were provided by Mr. Bramlett. (DBI Ex. 1, p. 11; DBI Ex. 2, pp. 2-3; Tr. 143-45.)

42. Ms. Marshall testified that the Opposition was structured like any other pleading. It included a statement of facts supplied by the client and legal argument, based on those facts, prepared by Arent Fox. She said similarly structured pleadings concerning EEO matters had been filed by Arent Fox on many occasions. According to Ms. Marshall, the conclusory statements concerning DBI's compliance with the FCC's EEO rules were not intended to be factual assertions. Rather, they were legal conclusions based on the facts set forth in the Opposition. (DBI Ex. 2, p. 3.)

The July 3, 1989, Letter and DBI's July 28, 1989, Response

43. By letter dated July 3, 1989, from Glenn A. Wolfe, Chief of the Mass Media Bureau's EEO Branch, to Mr. Bramlett, it was stated there was "insufficient information to make a determination that efforts were undertaken to attract minority applicants whenever there were job openings." The following information was requested *for each position filled* during the three-year period from November 1, 1985, to November 1, 1988: "job title, 395-B job classification, the full or part-time status of the position, the date the position was filled, the referral sources contacted, the number of persons interviewed (indicating those that were minority and female), and the referral source, gender and race or national origin (e.g., Hispanic) of the successful candidate." A copy of this letter was sent to Mr. Van Horn. (MMB Ex. 3; DBI Ex. 4, p. 35.)

44. The July 3 letter was received by Mr. Van Horn before it was received by Mr. Bramlett. (DBI Ex. 4, p. 36; Tr. 455-56.) Mr. Bramlett had one brief conversation with Mr. Van Horn concerning the letter and DBI's response. (DBI Ex. 1, p. 12; DBI Ex. 4, pp. 36-37; Tr. 459-60, 746.) Mr. Bramlett believed the conversation took place before he received a copy of the letter. (DBI Ex. 1, p. 12; Tr. 455-56.) Mr. Van Horn did not ask Mr. Bramlett any questions concerning the specific categories of information requested in the July 3 letter. (Tr. 459-60, 745.) The letter asked for specific statistical information which Mr. Van Horn understood the Stations did not have because the pertinent documents had been lost or destroyed. (DBI Ex. 4, pp. 37-39, 41-43; Tr. 746-47.) Mr. Van Horn recalled asking Mr. Bramlett whether he had any additional information he could provide that was not already in the Opposition. (Tr. 745.) Mr. Bramlett could not recall the specifics of his conversation with Mr. Van Horn, although he did remember that his understanding as a result of the conversation was that the Commission was seeking information only about DBI's *minority* hires and that DBI had already provided such information in the Opposition. (DBI Ex. 1, p. 12; Tr. 460-61.)

45. Mr. Bramlett received a copy of the July 3 letter before DBI's response thereto was filed on July 28, 1989. He did not read the letter carefully because he had already discussed it with his attorney who he assumed had reviewed it carefully himself. He felt comfortable in following his attorney's advice and instructions. He responded to his attorney's questions to the best of his ability. (DBI Ex. 1, p. 12; Tr. 462-65.)

46. By letter dated July 28, 1989, from Mr. Van Horn to Donna R. Searcy, Secretary of the FCC, DBI responded to the July 3 letter by submitting a copy of the Opposition and stating that "[t]he information requested by Mr. Wolfe's office is contained in the text of the Opposition." (MMB Ex. 4 p. 1.)[2] Mr. Van Horn, referring to himself as a "bumbling idiot," acknowledged that the foregoing statement was not phrased as carefully as it should have been. The statement should have read: "The information requested by Mr. Wolfe's office to the extent available, is contained in the text of the Opposition." (DBI Ex. 4, pp. 67-68.) The July 28 response was prepared by Mr. Van Horn. Ms. Marshall had no involvement in its preparation. (DBI Ex. 2, pp. 4-5; Tr. 189.)

47. Mr. Van Horn made the decision to file a copy of the Opposition in response to the July 3 letter. Mr. Bramlett received a copy of the July 28 response after it was filed. He glanced through it and put it in the Stations' public file. He did not read the July 28 response to see if the questions in the July 3 letter had been answered. (Tr. 465-66.) Mr. Bramlett recognized for the first time when he read the *HDO* that in attempting to prove he was not a racist he had not fully responded to the July 3 letter. He later learned that his counsel believed he had provided all the information available because counsel did not realize Mr. Bramlett had directed his attention solely to minority hires. (DBI Ex. 1, pp. 12-13.)

The March 15, 1991, Letter and DBI's April 18, 1991, Response

48. No communications between the FCC and DBI occurred with respect to the Stations' EEO program for the next 18 months. Then, on February 20, 1991, Hope G. Cooper, a staff person in the Bureau's EEO Branch, telephoned Ms. Marshall regarding the information submitted with the July 28 response. This conversation was followed by a letter dated March 15, 1991, from Mr. Wolfe to Mr. Bramlett, with a copy to Ms. Marshall. The March 15 letter was characterized as a "follow up" to the February 20 conversation between Ms. Cooper and Ms. Marshall, and read, in pertinent part:

[2] In this connection, it is noted that, although the July 3 letter sought specific information about *all* hires over a particular 3-year period (MMB Ex. 3), the Opposition covered only *minority* hires over the 7-year License Period (MMB Ex. 4, pp. 2 *et seq.*).

> In your inquiry response, you provided information only for positions for which you considered and/or hired minorities. However, we requested recruitment and hiring information for *all full-time and part-time hires* during the reporting period. Because we do not have enough information to determine whether sufficient efforts were undertaken to attract Black applicants when job openings occurred, we are again requesting the following information.

(MMB Ex. 6; emphasis added.) The letter went on to request the same seven categories of information requested in the July 3 letter for each position filled during the one-year period November 1, 1987, to November 1, 1988. (*Id.*)[3] This was different in scope from the July 3 letter, which covered the three-year period November 1, 1985, to November 1, 1988. (MMB Ex. 3.)

49. Ms. Marshall did not recall the specific conversation with Ms. Cooper on February 20, 1991, although she did recall that as a general matter each letter from the FCC received in connection with this project was preceded by a telephonic inquiry from Ms. Cooper. (DBI Ex. 2, pp. 5-6.) When Ms. Marshall first received the March 15 letter she examined DBI's file to ascertain what it had submitted in response to the July 3 letter. She determined that the Commission's assessment that DBI's July 28 response did not provide the requested information was accurate. (Tr. 196-98.) She also noticed that the March 15 letter was similar to letters sent by the FCC to other clients seeking additional EEO information. She thought it unusual, however, that the letter only sought information with respect to the one-year period from November 1, 1987, to November 1, 1988. In her experience, most letters of a similar nature from the FCC covered periods of three years or more. (DBI Ex. 2, pp. 5-6; Tr. 192, 196-97.)

50. It was Ms. Marshall's belief at the time she received the March 15 letter that the information included in the Opposition was all the information available to DBI, with respect to the Reporting Year and the License Period, that was responsive to the categories of information requested. This belief was based upon her recollection that in preparing the Opposition "we had obtained as much information as we could from Mr. Bramlett because he did not have complete records." (DBI Ex. 2, p. 6.) This belief was also based upon her review of the July 3 letter, which requested the same categories of information as the March 15 letter for the three-year period November 1, 1985, to November 1, 1988, and the July 28 response thereto, which merely resubmitted the Opposition and provided no additional information. (*Id.*; Tr. 196-97, 213, 215.) It had been two years since the Opposition was filed and, especially in view of the nature of the July 28 response, Ms. Marshall did not understand that Mr. Bramlett had fixed only on minorities and had not provided information relative to all hires. (Tr. 216.)

51. Ms. Marshall recalled talking to Mr. Bramlett in the course of preparing DBI's response to the March 15 letter and mentioning it was unusual that the Commission had just asked for one year's worth of information. (DBI Ex. 2, p. 6; Tr. 196-97.) In one conversation, she asked Mr. Bramlett in a general fashion without going through each category of information requested, whether he had any more information to add with respect to the Stations' EEO efforts. Mr. Bramlett said he did not. (DBI Ex. 2, pp. 6-7; Tr. 198-99, 213.) Ms. Marshall did not ask how many job openings there were in the Reporting Year, how many applicants there were for such jobs, what the nature of such jobs were, or what the recruitment efforts were with respect to such jobs. Nor did she ask whether DBI had employment applications or interview records, or ask or know whether DBI had payroll records. (Tr. 204-05.) The balance of her conversations with Mr. Bramlett related to gathering information concerning the period commencing February 1989. (DBI Ex. 2, p. 7.) This information was gathered by Mr. Bramlett at Ms. Marshall's suggestion to show the FCC that, although DBI could not provide the requested information with respect to the period specified in the letter, it could provide such information in connection with the post-license term period. (Tr. 199-200, 213, 565, 577-78.)

52. Mr. Bramlett recalled speaking with Ms. Marshall about the March 15 letter two or three times before he actually received a copy of it. In the first conversation, Ms. Marshall told him that the information sought only covered the one-year period from November 1, 1987, to November 1, 1988. In response to Ms. Marshall's questioning, he said he had nothing more to add with respect to that time period. He thought the information sought had already been provided in the renewal applications and the Opposition. The renewal applications and the Opposition did provide referral sources contacted, the number of total hires and the race or national origin of such hires during the Reporting Year. But the renewal applications and the Opposition did not provide for each position filled the job title, the date the position was filled, the referral sources contacted or the number of persons interviewed, including minority or female status where applicable. Based upon the Stations' computer records, Mr. Bramlett could have provided, for each of the 12 positions filled, the job title, 395-B job classification, full or part-time status and the date of hire. There were no written records, however, of the referral sources contacted or the minority status of persons interviewed for each position. In view of the more than two years that had elapsed since the Reporting Year, even if Mr. Bramlett had noted it at the time, he would not have been confident in his ability to accurately recall recruitment information other than in a general fashion as set forth in the Opposition. At the time of this telephone conversation with Ms. Marshall, Mr. Bramlett had not yet read the March 15 letter and Ms. Marshall did not review with him the seven categories of information requested in the letter. (DBI Ex. 1, pp. 13-14; Tr. 467-69, 473-75, 487-88, 653-55.)

53. The balance of Mr. Bramlett's conversations with Ms. Marshall with respect to the March 15 letter centered on gathering information regarding the period commencing February 1989. Mr. Bramlett received a copy of the March 15 letter sometime before DBI's response was filed with the FCC on April 18, 1991. By that time, he had hashed and rehashed the subject matter with Ms. Marshall over the

[3] This was the Reporting Year covered by the renewal applications and addressed in the Opposition. The *HDO*, at paragraph 9, incorrectly stated that the period covered by the March 15 letter was a three-year period.

telephone, and he was already gathering information, pursuant to her instructions, toward the preparation of a response. (DBI Ex. 1, p. 14; Tr. 471, 653-55.)

54. Mr. Bramlett glanced at the March 15 letter when he received it and filed it away. He did not read it carefully. Nor did he focus on any part of the letter because he thought Arent Fox had already done so and he felt secure in that fact. Based on his conversations with Ms. Marshall, Mr. Bramlett was not concerned by the fact that DBI had received a second inquiry letter from the FCC. He was confident that Arent Fox was doing the legal work and that he had answered every question posed by his attorneys. (Tr. 471-74.)

55. DBI responded to the March 15 letter by letter dated April 18, 1991, with attachments, from Ms. Marshall to Mr. Wolfe. The April 18 response included Ms. Marshall's cover letter and a six-page Supplemental Report to which there were attached Exhibit A (a one-page Statement dated April 18, 1991, signed by Mr. Bramlett), Exhibit B (a letter dated April 8, 1991, from Mr. Tate to Mr. Bramlett), and Exhibit C (a letter dated April 7, 1991, from Hundley Batts to Mr. Bramlett). (MMB Ex. 7.)

56. The Supplemental Report was divided into two basic parts. The first part (MMB Ex. 7, pp. 2-4) consisted of an introduction and what purported to be a summary of the information set forth in the July 28, 1989, response (*i.e.*, the Opposition), preceded by the following statement:

> In response to the instant request, the licensee has reviewed the stations' records and determined that it has nothing more to add. All of the information which is available for the 1982 through February 1989 period concerning the stations' EEO efforts was supplied in its July 28 response.

(*Id.* at pp. 2-3.) The first part of the Supplemental Report concluded with the following paragraph ("Concluding Paragraph"):

> As a result of their contact with these recruitment sources, from 1982 through February 1989, the stations hired *approximately 20 new employees* of which 7, or 35%, were African-Americans. Therefore, the stations' efforts were very successful despite the fact that there are only 7.4% African-Americans in the local labor force.

(*Id.* at p. 4; footnotes omitted; emphasis added.)[4]

57. The second part of the Supplemental Report (MMB Ex. 7, pp. 5-7) provided new information concerning the Stations' recruitment efforts and minority and non-minority hiring record with respect to the period commencing February 1989. The new information consisted of a description of eight hires at the Stations from February 1989 through July 30, 1990, including two Black males and one Black female, along with the number of minority and non-minority referrals, the referral sources and the job classification for each position. (*Id.*)

58. The Supplemental Report was prepared by Ms. Marshall based on her review of the Opposition and information supplied by Mr. Bramlett. The Supplemental Report was reviewed by Mr. Van Horn before it was sent to Mr. Bramlett for his review. (DBI Ex. 2, p. 8; DBI Ex. 4, pp. 48-49; Tr. 211.)

59. The statement in the Supplemental Report that there was "nothing more to add" was based upon Ms. Marshall's mistaken belief about the facts, as set forth in paragraph 50 above. The Concluding Paragraph was added by Ms. Marshall with the intention of summarizing the preceding two pages of the Supplemental Report and pertinent portions of the Opposition. Ms. Marshall did not discuss the Concluding Paragraph with Mr. Bramlett. The statement that there were "approximately 20 new employees" hired during the License Period was based upon the statements in the Opposition that there were 12 new hires in the Reporting Year and 7 minority hires in the balance of the License Period. At the time of the preparation of the Supplemental Report, Ms. Marshall believed that the information set forth in the Opposition represented all the information available for the License Period. While the total number of hires discussed in the Opposition equalled 19, Ms. Marshall wrote "approximately 20" to account for the fact that DBI did not have complete records and that some of the information in the Opposition was based on memory. (DBI Ex. 2, pp. 8-9; Tr. 215-17.)

60. During the period in question, Ms. Marshall never doubted the accuracy of the statement that there had been "approximately 20 new employees" hired during the License Period. She testified:

> I didn't question the number 20 . . . because I pictured this as a small station, as a Mom and Pop organization, and as a very stable organization where few people came and left. And even if it was a larger organization, I listen to WMAL, Harden and Weaver, every morning and those two people have been there for 20 or 30 years and nobody has left. They're the same engineers – and I have never visited radio stations, and the fact that there were only 20 people that they hired during that seven year period didn't strike me as being unusual and I never questioned it in my own mind. I never questioned Mr. Bramlett about it.

(DBI Ex. 2, p. 9.) Ms. Marshall did not pay heed to the composition of the "approximately 20" hires, *i.e.*, 12 non-minorities in one year, the Reporting Year, and 7 minorities for the balance of the 7-year License Period. She recognized in hindsight that she should have questioned Mr. Bramlett further about this scenario, but she believed the number 20 was correct. (*Id.*) Mr. Van Horn had a similar understanding of the nature of the Stations and the size, composition, and stability of its staff. He had no reason to doubt the accuracy of the number of hires. (DBI Ex. 4, pp. 44-45, 51-53.)

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[4] The *HDO*, at paragraph 9, incorrectly stated that DBI "reiterated" in its April 18 response that seven (35 percent) of approximately 20 new employees were Black. The record establishes that this was the first time DBI made this representation.

61. Mr. Bramlett confirmed that the Concluding Paragraph was not prepared by him and not discussed with him. Mr. Bramlett did not provide Ms. Marshall with this information. Mr. Bramlett testified:

> I would never purport to tell anybody in the radio business with a straight face that you hire 12 people in one year, 8 people in the next year and a half and only 7 people, all of whom were minorities, in the previous six years in Decatur, Alabama, or at any radio station. I know it's not true and I would never try to get anybody to believe it.

(DBI Ex. 1, p. 16.)

62. Mr. Bramlett's Statement, Exhibit A of the Supplement Report, was made under penalty of perjury and read, in pertinent part:

> I have read the foregoing Supplemental Report relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were gathered and supplied by me and my staff and are accurate and complete.

(MMB Ex. 7, p. 9.) Before signing this Statement, Mr. Bramlett flipped through the April 18 response in order to locate the information he had supplied to Ms. Marshall with respect to the eight new post-February 1989 hires. Mr. Bramlett read such information (MMB Exhibit 7, pp. 6-7) carefully and confirmed its accuracy. Mr. Bramlett did not read the Concluding Paragraph where it was represented that DBI had approximately 20 new hires during the License Period, and was unaware that DBI had made any representation as to the total number of hires at the Stations during the License Period. As was his habit, when he saw a page with a lot of footnotes he believed there was no sense reading it because it was "legal arguments and legal stuff" which he would not be able to comprehend.[5] Mr. Bramlett was asked by Ms. Marshall to review the draft and let her know if any changes were necessary. However, at the time, it was Mr. Bramlett's practice to sign anything his lawyers sent to him to sign. (Tr. 478-83, 560-64, 570-71.)

63. Ms. Marshall confirmed that, in reviewing the draft of the Supplemental Report with Mr. Bramlett, she concentrated specifically on the facts set forth about the eight new post-February 1989 hires (MMB Ex. 7, pp. 5-7), and did not discuss the materials preceding those pages, which represented her attempt to summarize the information set forth in the Opposition. (DBI Ex. 2, p. 8; Tr. 212.)

The October 7, 1991, Telephone Call and DBI's October 15, 1991, Response

64. The next communication between the FCC and DBI took place on or about October 7, 1991, when Ms. Cooper of the EEO Branch telephoned Ms. Marshall. Ms. Marshall recalled that Ms. Cooper, in a brief conversation, questioned the variation in the Stations' hiring rate, noting that for the Reporting Year there were 12 hires and that this was more than other years either before or after. After her conversation with Ms. Cooper, Ms. Marshall telephoned Mr. Bramlett, informing him of Ms. Cooper's question. Mr. Bramlett explained that the turnover rate at radio stations varied from year to year. During this short conversation, Ms. Marshall directed her attention to the variation in turnover rate. She did not focus at all on the number 20 because she had no doubt as to its accuracy. (DBI Ex. 2, p. 10; Tr. 231-33.)

65. According to Mr. Bramlett's recollection of this conversation, Ms. Marshall simply asked him how DBI could have had 12 hires in the Reporting Year and then have had 8 hires in the year and a half thereafter; why was there a difference? Mr. Bramlett answered that employee turnover was different from one year to another. He was perplexed as to why Ms. Cooper had asked such a question, but in his mind it did relate to the one-year period addressed in the March 15 letter and the new information for the period commencing February 1989 supplied in DBI's April 18 response. (DBI Ex. 1, p. 17; Tr. 566-70.) Mr. Bramlett viewed his response as favorable to DBI because even though the turnover rate was going down, DBI's EEO efforts had produced more minority applicants and hires. (Tr. 569.) Mr. Bramlett recalled that there was only one call from Ms. Marshall and that she asked only that one question. His response did not require a lot of concentration. In this conversation, Ms. Marshall never mentioned the number 20 and never discussed the total hires over the License Period. (DBI Ex. 1, p. 17; Tr. 575-76.)

66. Ms. Marshall prepared a draft response and sent it to Mr. Bramlett for his review and signature. (Tr. 572-73.) The draft was in the form of a "Statement" executed under penalty of perjury which consisted of five numbered paragraphs. (MMB Ex. 8, p. 2.) Ms. Marshall showed the draft to Mr. Van Horn before sending it to Mr. Bramlett. (DBI Ex. 2, p. 10; DBI Ex. 4, pp. 55-58; Tr. 235.)

67. When Mr. Bramlett received the draft Statement, he scanned it and found the paragraph which discussed the turnover rate (paragraph 4). Mr. Bramlett read that paragraph, and only that paragraph, before signing the Statement on October 10, 1991. (Tr. 573, 651; MMB Ex. 8, p. 4.)[6] Paragraph 5 of Mr. Bramlett's Statement read:

> I have read the foregoing and have determined that, to the best of my knowledge and belief, all of the facts contained herein concerning the employment record of Stations WHOS and WDRM are accurate and complete.

(MMB Ex. 8, p. 4.) Although Mr. Bramlett had read only paragraph 4, he testified that he believed that his October 10 Statement was accurate and responsive to the FCC's request. (DBI Ex. 1, pp. 17-18.)

68. On October 15, 1991, Ms. Marshall filed DBI's response to Ms. Cooper's telephone inquiry. The response consisted of Ms. Marshall's cover letter, to which was attached the five-paragraph Statement of Mr. Bramlett re-

[5] In this connection, it is noted that approximately three-fourths of the page on which the Concluding Paragraph appeared (MMB Ex. 7, p. 4) consisted of footnotes.

[6] Mr. Bramlett initially testified that he did not read any of this Statement before signing it. (Tr. 571-73.) He later corrected this testimony as reflected in the text. (Tr. 651.)

ferred to above. (MMB Ex. 8; DBI Ex. 1, p. 18.) At paragraph 3 of Mr. Bramlett's Statement, Ms. Cooper's informal request was described as follows:

> Ms. Cooper has requested information concerning the number of new hires at the stations during the period 1982 through 1989 and thereafter. Specifically, Ms. Cooper is questioning why so few new hires (20) were reported for that seven-year period when the stations had as many as eight, almost one-half that number, job openings during the 15-month period from February 1989 through mid-April 1991, alone.

(MMB Ex. 8, pp. 2-3.) DBI's response to this request was set forth at paragraph 4 of Mr. Bramlett's Statement, as follows:

> In response to this request, the stations' staff has again reviewed the stations' records and determined that there is nothing more to add. All of the information which is available for the 1982 through April 1991 period concerning the stations' EEO efforts has been provided to the Commission in various filings, including the licensee's July 28, 1989 response to the FCC's earlier request for EEO information and the licensee's April 18, 1991 Supplement thereto. The stations' staff has determined that the variation in the number of available vacancies during the years under scrutiny can only be attributed to the turnover rate at radio broadcast stations which often varies from year to year.

(*Id.* at p. 3.)

69. In hindsight, it was clear to Mr. Bramlett that paragraph 3 of his Statement assumed DBI had previously reported there were 20 new hires during the License Period. Mr. Bramlett had not discussed that point in his conversation with Ms. Marshall and missed it in his limited review of the Statement, having read only paragraph 4 thereof. As a rule, Mr. Bramlett did not pick apart or question statements prepared by his attorneys for his signature. (DBI Ex. 1, pp. 18-19; Tr. 651.) Rather, it was his practice at the time to sign anything his attorneys asked him to sign. (Tr. 563-64.) Mr. Bramlett admitted he made a "terrible mistake -- the biggest mistake of my career." From the time of his receipt of the Petition to Deny until December 1991, Mr. Bramlett directed his efforts to documenting the Stations' EEO efforts and *minority* hiring, not the total number of hires, because of his obsession with the accusation that he had discriminated against Blacks. (DBI Ex. 1, p. 19.)

70. The facts set forth in Mr. Bramlett's Statement were consistent with Ms. Marshall's understanding at the time. She did not question the accuracy of the representation that there were 20 new hires during the License Period. She therefore did not question Mr. Bramlett about that fact in connection with her preparation of his Statement. (DBI Ex. 2, p. 11; Tr. 234.)

The Period From October 15, 1991, Through Early January 1992

71. Between October 15, 1991, and mid-December 1991, there were a series of telephone calls between Ms. Marshall and Ms. Cooper and, on one occasion, Mr. Wolfe. The purpose of the conversations was to clarify the number of total hires during the License Period. Ms. Cooper had concluded, based on her review of the Stations' Annual Employment Reports, that the number of hires during such period must have been more than 20. At first, Ms. Marshall did not agree with Ms. Cooper's analysis. Ms. Marshall did her own analysis of the Annual Employment Reports and had arrived at a total of 20 new hires for the period. Ms. Marshall calculated the change from year to year in the number of full-time and part-time employees at the Stations as reflected in the Stations' Annual Employment Reports, after modifying the numbers to reflect the corrections made in DBI's Opposition to Petition to Deny. She counted any increase in the total number of full-time and part-time employees from one year to the next as an increase in the number of hires. She added all such increases from year to year during the License Period and came up with 20. She did not subtract any decreases in such employees from year to year. After follow-up clarifying conversations with Ms. Cooper, Ms. Marshall realized that under her analysis, based solely on the Annual Employment Reports, there were no new hires between 1987 and 1988 because the number of full-time and part-time employees in the 1988 Report was less than the corresponding number in the 1987 Report. In fact, however, as had been reported in the renewal application, as corrected in the Opposition, there had been 12 hires during that period. Ms. Marshall therefore came to agree with Ms. Cooper's analysis and concurred that there must have been at least 32 new hires during the License Period, *i.e.*, 20 based on Ms. Marshall's analysis of the Annual Employment Reports plus 12 in the Reporting Year. (DBI Ex. 2, pp. 11-12; Tr. 236-40.)

72. Ms. Marshall discussed with Mr. Bramlett her conversations with Ms. Cooper. (DBI Ex. 2, p. 12.) While Ms. Marshall did not have a specific recollection of telling Mr. Bramlett that DBI had represented there were approximately 20 hires at the Stations during the License Period, the premise of their discussion was that there must have been more than 20 hires in the License Period, so the number 20 must have been discussed at this point. (Tr. 236-42.) Because she believed that the information previously provided to the Commission was based upon all available documents, Ms. Marshall asked Mr. Bramlett, probably in mid-December 1991, to have his staff members search their collective recollection to see whether they could remember additional hires, and related recruitment information, during the License Period. (DBI Ex. 2, pp. 12-13.) Ms. Marshall could not recall Mr. Bramlett's reaction to her request, nor could she recall Mr. Bramlett commenting as to the accuracy or inaccuracy of the number 20. One comment made by Mr. Bramlett during their discussion about the total number of hires in the License Period did stick in her mind.[7] Mr. Bramlett said something to the effect of, "Oh, you mean now I have to do more than one year," or "go back beyond a year." Ms. Marshall thought the comment was odd at the time, but she did not

[7] Mr. Bramlett may have said other things as well, but Ms. Marshall could not recall them. (Tr. 257.)

question it. She just tried to coax Mr. Bramlett to remember additional hires. (*Id.* at p. 13; Tr. 238, 241, 257, 286-87.)

73. Mr. Bramlett recalled the following concerning his conversations with Ms. Marshall in December 1991, regarding her telephone calls with Ms. Cooper. Ms. Marshall said that Ms. Cooper had convinced her there must have been at least 30 new hires at the Stations during the License Period. Ms. Marshall noted that this was more than the "approximately 20" hires that DBI had described previously, and she asked Mr. Bramlett to see whether he or his staff could remember additional hires, and related recruitment information, during the License Period. This was the first time Mr. Bramlett became aware that DBI had made statements in its April 18 and October 15, 1991, responses about the *total* number of hires during the *License Period.* (DBI Ex. 1, p. 20; Tr. 579-81, 589-90.) He was "surprised and a little bit shocked" to learn this, but he did not have a fear that DBI had "done some terrible wrong." (Tr. 580, 590.) He knew that DBI had made representations as to the number of minority hires in the License Period (in the Opposition) and the total number of hires in the Reporting Year (in the renewal applications and the Opposition), and that the FCC had asked for Reporting Year hires in the March 15 letter. At some point in his conversations with Ms. Marshall, Mr. Bramlett asked her by way of clarification whether the FCC wanted information beyond the Reporting Year and she answered in the affirmative. Once he learned the FCC wanted such information, he directed his attention to gathering it. He did not dwell on what had been represented, nor did he tell Ms. Marshall at this time or any time prior to the release of the *HDO* that he had never intended to make a representation as to the total number of hires during the License Period. (DBI Ex. 1, pp. 20-21; Tr. 579-82, 589-90.)

74. After the holidays in late December 1991, or early January 1992, Mr. Bramlett and his wife gathered, pursuant to Ms. Marshall's instructions and based solely upon their recollections, hiring and recruitment information with respect to an additional 17 hires during the License Period. Mr. Bramlett's focus in this initial search was on additional hires with respect to whom he could also recall recruitment information, such as source, number, and racial breakdown of interviewees. He transmitted this information to Ms. Marshall in early January 1992. In discussing this information with her, she asked Mr. Bramlett for the first time whether he could provide similar recruitment information for the 12 hires during the Reporting Year. Mr. Bramlett said he could try, but that it too would be based only upon recollection. He provided this information to Ms. Marshall shortly thereafter. (DBI Ex. 1, p. 21; Tr. 672-73.)

75. After Mr. Bramlett sent the information about the 17 additional hires to Ms. Marshall, he thought further about whether he could identify any additional hires. At this point, he decided he needed to review payroll records, not just rely on memory of recruitment efforts, to do the search properly. He asked his wife to search for payroll records for the period prior to 1988, although he believed that the payroll records had been lost or destroyed as a result of previous studio moves.[8] Payroll records for 1988 were available on the Stations' computer. (DBI Ex. 1, pp. 21-22.)

76. Mr. Bramlett had not looked for payroll records before this time because he did not think he needed them. He had only reviewed EEO-related documents because his efforts had been directed to gathering recruitment and minority hiring information to deal with the discrimination charge, and the payroll records contained no such information. (DBI Ex. 1, p. 22.) It never occurred to Mr. Bramlett, and it was never suggested to him, that payroll records might be useful merely to identify who worked at the Stations during the License Period in order to help trigger his recollection as to the universe of minority hires or other EEO-related information. Up until December 1991 Mr. Bramlett was not aware that the FCC wanted information about *all* hires during the License Period. Mr. Bramlett's mindset was locked in on EEO-related information, by which he meant minority hires, recruitment efforts, applicants and interviewees, and he searched the Stations' EEO records only. Ms. Marshall never told him to search for payroll records even if they did not contain EEO information. (Tr. 669-84.)

The January 2, 1992, Letter and DBI's January 13, 1992, Response

77. By letter dated January 2, 1992, from Mr. Wolfe to Mr. Bramlett, Mr. Wolfe summarized the prior communications between the FCC and DBI through the October 15, 1991, response, and then stated as follows:

> Upon review of the stations' Annual Employment Reports during the license term and your inquiry responses, we determined that the number of hires occurring during this period must have been greater than 20 just to account for the changes in staff size and composition from 1982 through 1988. Ms. Cooper therefore again spoke with your attorney concerning the number of hires that you reported at the station during the license term and requested an explanation for the above-noted discrepancy.

(MMB Ex. 9, pp. 1-2.) Mr. Bramlett received the January 2 letter sometime prior to January 8, 1992, the initial deadline for responding to the FCC's telephonic request. (DBI Ex. 1, p. 23.) Mr. Bramlett briefly glanced over the letter, but did not read it carefully. He thought it was a rehash of Ms. Cooper's telephonic request to Ms. Marshall. (Tr. 592-93, 595.) Mr. Bramlett did not ponder the January 2

[8] When Mr. Bramlett first thought about old payroll records in December 1991, he believed all such records had been thrown away when the upstairs storage area in the building where the Stations' studios were previously located had been cleaned out in early to mid-1988. At that time, three one-and-one-half ton truckloads of material were taken to the dump. Mr. Bramlett had shown his son and one of his friends, who were involved in the clean-up, what he wanted saved, but they became aggressive in their work and threw away a lot of the things he intended for them to keep. It was in that context that Mr. Bramlett thought that all the records were probably gone. The storage area where the files were ultimately found was a commercial storage locker, not an organized area. It was full of boxes of materials, old microphones, old air conditioners, and other discarded equipment thrown in, in a disorganized way. There was no record or inventory of its contents. It was not a place one could go to and spot what one was looking for without stepping over and around the various items stored there and going through boxes to see what they contained. (DBI Ex. 1, p. 22; DBI Exs. 12-18.)

letter or solicit help in understanding it fully because he did not fear that DBI's license was in jeopardy. His mindset was that errors had been made and efforts were then underway to develop the information that Ms. Marshall requested. (Tr. 596-97.) Ms. Marshall did not review the contents of the letter with Mr. Bramlett. In her view the January 2 letter summarized the substance of her conversations with Ms. Cooper, including her request as to the accuracy of the number 20. Ms. Marshall and Mr. Bramlett were in the process of responding to Ms. Cooper's telephonic request when the letter was received. (Tr. 242-47.)

78. Early on January 8, just prior to the time DBI's response to the January 2 letter, disclosing 17 additional hires, was to be filed, the payroll records for the period 1982 through 1987 were located. Mr. Bramlett telephoned Ms. Marshall and told her that payroll records had been located which he believed could clarify the total number of hires during the License Period. Ms. Marshall then spoke with Mr. Van Horn, called Mr. Bramlett back, and directed him to review the records and provide her with accurate and complete hiring information as soon as possible for submission to the FCC. (DBI Ex. 1, p. 23; DBI Ex. 2, p. 14.) Ms. Marshall then called Ms. Cooper and requested an extension of time within which to respond to the January 2 letter. It was agreed that the response would be filed by January 13. (DBI Ex. 2, p. 14.) In the interim, Mr. and Mrs. Bramlett reviewed the payroll records. (DBI Ex. 1, p. 23.) Midday on Friday, January 10, 1992, Mr. Bramlett telecopied to Ms. Marshall information based on the payroll records with respect to the hiring of 83 "employees" and 57 "non-employees." (DBI Ex. 1, p. 23; DBI Ex. 2, p. 14.) Although Ms. Marshall believed there had to have been more than 20 total hires during the License Period, she was "surprised" to learn that the total was quite a bit more than 20. Ms. Marshall spoke to Mr. Van Horn about this matter and his reaction was that a mistake had been made. He instructed Ms. Marshall to concentrate with Mr. Bramlett on getting accurate information to the FCC. (Tr. 261-62.)

79. At some point after the discovery of the payroll records and before the filing of DBI's response to the January 2 letter, Mr. Bramlett and Mr. Van Horn spoke by telephone. Mr. Van Horn told Mr. Bramlett that the disclosure of the discovery of payroll records and the existence of a substantial number of additional hires would probably have a serious negative impact on DBI. Mr. Bramlett was aware that disclosure of this information could result in the designation of the renewal applications for hearing. (DBI Ex. 1, p. 23; Tr. 597, 736-37.) Mr. Bramlett believed, however, that if he provided the FCC with all the information they requested DBI would not have any problem. (Tr. 597.) There was never any consideration given by Mr. Bramlett, Ms. Marshall, or Mr. Van Horn to not disclosing the newly discovered information. (DBI Ex. 1, pp. 23-24; DBI Ex. 2, pp. 14-15; DBI Ex. 4, pp. 60-61, 68-69; Tr. 757.)

80. By letter dated January 13, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted in response to the January 2 letter a Supplemental Report (the "Second Supplemental Report") consisting of four pages of text, attached to which were Exhibit A (titled "New Hires at Stations WHOS/WDRM During 1982 - February 1989"), and Exhibit B (a "Statement" under penalty of perjury executed on January 13, 1992, by Mr. Bramlett). (MMB Ex. 10.) Exhibit B, Mr. Bramlett's Statement, read in pertinent part:

> I have read the foregoing [Second] Supplemental Report relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were supplied by me and my staff and are accurate and complete.

(*Id.* at p. 9.) The January 13 response was prepared by Ms. Marshall based upon her review of DBI's previous filings, her understanding of the facts, and information supplied by Mr. Bramlett. (DBI Ex. 2, p. 15.)

81. The text of the Second Supplemental Report consisted of a summary of the January 2 letter with the following two paragraphs:

> In response to the instant request, the licensee has again reviewed the stations' records. As a result of its review of the existing records, the licensee has determined that the information previously provided to the Commission was the best information the licensee was able to provide based on available documentation of recruitment efforts. The licensee has not, prior to the instant report, provided recruitment information which goes beyond that which could be verified from contemporaneous records maintained at the stations.
>
> However, in view of the FCC's concern in its most recent letter that the stations had a greater number of new hires during the 1982 through February 1989 period than previously reported, the stations' staff has searched its collective memory and determined that 83 new hires, including the seven minority new hires described in the licensee's July 28 Report, rather than the "approximate [sic] 20," should have been reported. [Footnote 2 omitted.] It must be noted that the recruitment information for these additional new hires is based almost entirely on the collective memory of the staff. With the exception of some payroll lists [Footnote 3], no documentation exists to support the information provided about the additional new hires.

Footnote 3 read as follows:

> The existence of payroll lists were discovered last week. The lists were discovered in a warehouse offsite, and, according to the staff, apparently had been stored there during a move of the stations' studios. The staff was unaware of the existence of these payroll lists and believed that they had been lost or destroyed during the move. Consequently, the staff had relied on the few records which remain on site at the stations to support their prior estimate that there were "approximately 20" new hires. With the discovery of the warehoused lists, the staff can now more accurately determine the number of new hires. However, any information provided herein about the stations' efforts to recruit the additional new hires is based on the collective memory of the staff.

(MMB Ex. 10, pp. 3-4.)

82. The foregoing portions of the Second Supplemental Report were prepared by Ms. Marshall based upon and consistent with her understanding of the pertinent facts. She did not discuss with Mr. Bramlett the use of the terms "available documentation" or "contemporaneous records." Nor did she discuss with him to what they might refer. In her mind they were generic references to the information available to Mr. Bramlett concerning the Stations' recruitment efforts. She also did not discuss with Mr. Bramlett the explanation set forth in Footnote 3 as it pertained to the prior estimate of approximately 20 new hires. (DBI Ex. 1, p. 25; DBI Ex. 2, pp. 16-17; Tr. 610.)

83. Exhibit A of the Second Supplemental Report set forth hiring information for each year from 1982 through 1988 and for the first two months of 1989, and listed the recruitment sources relied upon during the License Period. Exhibit A further provided the following information with respect to certain "non-employee" hires and recruitment:

> During the period 1982 through 1988, WDRM/WHOS had a total of 57 people who worked from 1 day up to 60 days as talent only and were not employees of the stations, although a certain number of these were considered part-time employees at the time of the filing of the Annual Employment Reports. It is the policy of WHOS/WDRM that any hire does not become permanent until after 60 days.

(MMB Ex. 10, p. 7.) The facts set forth in Exhibit A were provided by Mr. Bramlett. (DBI Ex. 1, p. 26; DBI Ex. 2, p. 17; Tr. 605-06.) The last sentence of the paragraph quoted above represented Ms. Marshall's understanding of the Stations' policy. Ms. Marshall did not herself consider or discuss with Mr. Bramlett the FCC's policy concerning whether or not an individual working at a broadcast station was considered an employee. No breakdown was provided at the time of the filing of the January 13 response as to the number of individuals within the 57 who were on probation versus those considered temporary. Exhibit A was prepared in a short period of time in order to meet the extended January 13 filing deadline. The objective of both Ms. Marshall and Mr. Bramlett was to ensure that the facts set forth therein were as accurate as possible. (DBI Ex. 1, p. 26; DBI Ex. 2, pp. 17-18.)

84. Mr. Bramlett acknowledged, after carefully reviewing Footnote 3, that the fourth sentence thereof implied that DBI had intended to state in earlier filings that there had been approximately 20 hires during the License Period. However, Mr. Bramlett did not take notice of the facts set forth in the textual portion of the Second Supplemental Report and therefore was not cognizant of the explanation set forth in Footnote 3. This was so because Mr. Bramlett received for his review by facsimile a draft of the January 13 response at approximately 3:30 p.m. on the day it was due, *i.e.*, January 13. (DBI Ex. 1, pp. 26-27; Tr. 606.) Mr. Bramlett "had about 20 minutes to turn this around" and get it back to Ms. Marshall. Consequently, the only thing he looked at, and was confident about, was Exhibit A. (Tr. 606.) Indeed, except for the contents of Exhibit A, Mr. Bramlett had no idea as to the meaning of the Second Supplemental Report. In attesting to the accuracy of the Second Supplemental Report, he was attesting to the accuracy of the facts he had provided, as set forth in Exhibit A, which he did in fact review. (Tr. 605-09, 650-52.)

85. Ms. Marshall explained how the textual portion of the Second Supplemental Report came to be prepared. The two paragraphs quoted at paragraph 81, *supra*, were prepared and ready to be sent to Mr. Bramlett for his review on January 8, 1992, in connection with the contemplated disclosure of the 17 additional hires which Mr. Bramlett had developed based solely on his memory. This disclosure included Mr. Bramlett's best recollection of the recruitment sources and the number, race and gender of interviewees, for each of the 17 positions filled. When Mr. Bramlett provided the revised hiring information based upon the payroll records, Ms. Marshall marked up her draft of the January 8 filing in preparing the January 13 response. No change was made to the first paragraph and the second paragraph was modified to change the number of new hires to 83 from 37 and to add Footnote 3 and the reference to the payroll lists in the final sentence. (DBI Ex. 2, p. 18.)

86. At the time the explanation set forth in Footnote 3 as to the basis for the earlier estimate of approximately 20 new hires was prepared, it reflected what Ms. Marshall believed to be the truth. When Ms. Marshall learned that there were at least 83 new hires during the License Period, she never asked Mr. Bramlett directly how he ever could have represented in the April 18 and the October 15, 1991, responses that there were only 20 hires during that period. Instead, she concentrated on what she thought was the most important matter, getting the new information to the Commission as quickly and accurately as possible. She assumed, without confirming her assumption with Mr. Bramlett, that the explanation provided with respect to the basis for the recruitment information, that it had previously been based upon available documentation, also applied to hiring information. Ms. Marshall later learned this was not the case. (DBI Ex. 2, pp. 18-19; Tr. 247-49.)

The January 24, 1992, Letter and DBI's February 7, 1992, Response

87. On January 24, 1992, Ms. Cooper telephoned Ms. Marshall regarding the January 13 response. This conversation was memorialized by a follow-up undated letter to Mr. Bramlett from Mr. Wolfe, with a copy to Ms. Marshall,[9] requesting in substance the following: (a) with respect to the 83 hires and the 57 "non-employees" listed in Exhibit A to the Second Supplemental Report, state whether the 57 non-employees were included in the 83 hires or whether they were in addition to the 83 hires, and explain what these individuals did at the Stations and why they were not considered employees; (b) provide for all hires, regardless of the length of employment, the exact date of hire, the title, the 395-B classification, and full or part-time status of the position and the name, race, gender and date of termination of the hiree; and (c) explain the status in more detail of the four individuals originally listed in the Form 396 as hires during the Reporting Period but subsequently listed in the Opposition to Petition to Deny as non-employees. Mr. Bramlett did not read the January 24 letter

[9] For ease of reference, this undated letter will be referred to as the January 24 letter because it was sent at or shortly after the January 24, 1992, telephone conversation.

carefully when he received it because he had already spoken with Ms. Marshall about its contents. (MMB Ex. 18; Tr. 611-12.)

88. By letter dated February 7, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted "Supplementary Materials" in response to the January 24 letter. (MMB Ex. 11.) The Supplementary Materials consisted of two pages of text, Exhibit 1 ("Explanation of 83 Hires 1982 - Feb 1989 by Date"; two pages), Exhibit 2 ("Explanation of 57 Non-hires 1982 - Feb 1989 by Date"; two pages), Exhibit 3 (payroll records which documented information provided in Exhibits 1 and 2; 303 pages), and Exhibit 4 (a "Statement" under penalty of perjury executed by Mr. Bramlett on February 6, 1992; one page). Exhibit 1 contained a list of the 83 new employee hires during the License Period, including the names of the hirees, their dates of hire, the titles of their positions, the FCC Form 395-B classification of their positions, the full or part-time status of their positions, the race and gender of the hirees, and their dates of termination. (*Id.* at pp. 5-6.) Exhibit 2 contained a list of the 57 people who were hired during the License Period but who were not considered "employees" of the Stations, including their names, the dates of their hires, the titles of their positions, the FCC Form 395-B classification of their positions, the trainee or temporary status of their positions, the race and gender of the individuals, and their dates of termination. (*Id.* at pp. 8-9.) The Supplementary Materials also clarified that the 57 "non-employees" were in addition to the 83 hires listed in Exhibit 1. (*Id.* at p. 3.) Exhibit 4, Mr. Bramlett's Statement, read in pertinent part:

> I have read the foregoing Supplemental Report [sic] relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were supplied by me and my staff and are accurate and complete.

(*Id.* at p. 310.)

89. The text of the Supplementary Materials (the first two pages) was prepared by Ms. Marshall. The lists included as Exhibits 1 and 2 were prepared by Mr. and Mrs. Bramlett, with the assistance of the computer expertise of the Stations' National Sales Manager, Mark Goodwin, and were reviewed by Ms. Marshall. The payroll records attached as Exhibit 3, including handwritten payroll records for the period 1982 through 1987 and computer printouts for the year 1988, were provided by Mr. Bramlett. (DBI Ex. 1, p. 29; DBI Ex. 2, p. 20.)

90. The text of the Supplementary Materials provided the following explanation for the non-employee status of the 57 individuals listed in Exhibit 2:

> These 57 individuals were not considered by the licensee to be employees of the stations because either (a) they were hired as independent contractors on a purely temporary or "fill-in" basis and were not intended to work on a permanent basis, or (b) they were hired on a permanent basis, but were asked to leave their employment after a 60 to 90-day probationary period because they were found not to be qualified for the positions for which they were hired.

(MMB Ex. 11, p. 3.) It was also noted that the four individuals hired during the Reporting Year but not counted as "employee" new hires on the Form 396 as amended, were listed in Exhibit 2 and were hired on a temporary fill-in basis. (*Id.*) Mr. Bramlett was the source of these explanations. (DBI Ex. 1, p. 29.)

91. Footnote 2 to the text of the Supplementary Materials noted, *inter alia*, that there were "some inconsistencies" between the number of female new hires and the number of new hires in the Stations' upper-level job positions as reflected in the Form 396 for the Reporting Year and as reflected in Exhibit 1, and there were "slight inconsistencies" in the new hires in the License Period as reflected in the January 13 response and in Exhibit 1. The footnote stated that the inconsistencies were "due to the fact that the members of the stations' staff who prepared the renewal did not prepare the data as carefully as they should." It was also explained that the staff members who prepared the January 13 response did so based on a manual count of the payroll records, and that once the data reflected in the payroll records was entered into the Stations' computer, a more accurate list of the new hires was generated, and was attached (as Exhibit 1). The footnote concluded as follows:

> As noted in the January 13 filing, the existence of payroll records was discovered only a few weeks ago in a warehouse off-site. The licensee had been previously unaware of the existence of those records and believed that they had been lost or destroyed during a move of the stations' studios. Consequently, in prior filings to the Commission, the licensee had relied on the few records which remained on site to support its prior estimates of new hires and on the collective memory of the stations' current staff members.

(MMB Ex. 11, p. 2.) The members of the Stations' staff referred to in this footnote included Mr. Bramlett and his wife. Exhibits 1 and 2 were derived from the handwritten payroll sheets, the 1988 computer print-out, and certain canceled checks. (DBI Ex. 1, p. 30.)

92. Prior to the filing of the Supplementary Materials, Mr. Bramlett reviewed only the payroll sheets and the summaries thereof contained in Exhibits 1 and 2. He "glanced at" the remainder of the Supplementary Materials but did not read them. In particular, Mr. Bramlett did not read Footnote 2, or, if he did read it, did not read it carefully enough to understand it. (Tr. 613-15.)

93. By letter dated February 11, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted revised Exhibits 1 and 2 to the Supplementary Materials. The revised exhibits corrected certain typographical errors and provided additional explanatory information. (MMB Ex. 12.)

Mr. Bramlett's Mindset

94. Mr. Bramlett had been dealing with the FCC since 1962 when he started work as the Stations' engineer. He testified he had always paid meticulous attention to the Stations' operating parameters to ensure that they complied with the FCC's technical rules. Having dealt with the FCC for 30 years, Mr. Bramlett was acutely aware of a licensee's responsibility to comply with the Commission's rules and to be accurate and complete in all submissions to the Commission. (DBI Ex. 1, pp. 30-31.)

95. Mr. Bramlett retained a respected communications law firm to represent DBI before the FCC to ensure that DBI did not run afoul of the FCC's rules. With respect to inquiries from the FCC, he expected his law firm to review each inquiry carefully and to tell him what information he needed to provide in response. Because he was represented by counsel, he did not feel it was necessary or appropriate to second-guess their interpretation or advice with respect to such inquiries. Throughout this *Bilingual* investigation, he felt secure in the fact that his interests were being protected by counsel. Mr. Bramlett at all times responded promptly and fully to his counsel's inquiries and instructions, to the best of his ability. In responding to these queries, however, he did not refer back to previous DBI filings to make sure the responses fit together and were consistent. He expected his counsel to do that. In hindsight, Mr. Bramlett realized he should have reviewed the entire statements prepared for his signature more carefully. He assumed, however, that the statements reflected the facts he had provided to counsel and nothing more. He also realized in hindsight that he should not have assumed this. As a bottom line, however, Mr. Bramlett testified that he never knowingly provided inaccurate information or concealed information from the FCC. (DBI Ex. 1, pp. 31-32.)

96. Mr. Bramlett described his preoccupation with countering the NAACP's discrimination charge as follows:

> It is hard for me to explain my reaction to the fact that I was being charged with racial discrimination by the NAACP and how it affected me both physically and mentally. I have always treated Blacks just as I would Whites. When growing up, I had Black friends. I worked with Blacks. I never saw any difference between us. As the years passed, when I saw acts of prejudice, I would do what I could to make things right. I always hired station employees who could do the job, whether Black or White. In the mid-1970's I owned an engineering and manufacturing company and hired a Black as President. As the operator of a successful radio station, I make myself available to other radio people for advice, counsel and information including Blacks such as Nat Tate, Jr., Ricky Patton and Hundley Batts, who is one of the owners of an AM Station in Huntsville. Over the years, I have met regularly with Mr. Batts to consult and review market data with him so that he can better serve clients and increase his business and also advise him as to techniques and approaches to increasing sales. I know there is prejudice in my town just as there is in every town but I comport myself in a way consistent with my beliefs that all people are equal. That is why when I read the charge from the NAACP I became so upset and almost obsessed in my efforts to prove the charge wrong.

(DBI Ex. 1, pp. 33-34.)

Mr. Bramlett's Reputation in the Community for Truthfulness

97. Six witnesses testified as to Mr. Bramlett's reputation in the community for truthfulness.

98. *Julian D. Butler.* Mr. Butler is a 27-year resident of Huntsville, Alabama, and has engaged in the practice of law in that community for all of those years. Mr. Butler has served as County Attorney for Madison County, Alabama, for the past 16 years. He served as Chairman for the Center of Public Law and Service at the University of Alabama and is a member of the Chancellor's Public Affairs Advisory Group. Mr. Butler represents America's Counties on the Advisory Board of the State and Local Legal Center in Washington, D.C. He has served as Chairman of the Leadership Huntsville/Madison County Program of the Huntsville/Madison County Chamber of Commerce and in leadership positions with a variety of other civic, charitable and political organizations, including as General Counsel of the Alabama Democratic Party and the Madison County Democratic Party, statewide Chairman of the Unified Democratic Campaign in 1976, and District Chairman for the Boy Scouts on three different occasions. Mr. Butler has been involved in fund drives for the United Way and other charitable organizations, taught Sunday School for 20 years, and was a Deacon in his church. He has been involved in Bar activities, including as a founder and the second chairman of the Environmental Law Section of the Alabama State Bar. (DBI Ex. 11, p. 1; Tr. 694.)

99. Mr. Butler has been acquainted with Mr. Bramlett since February 1988, when he represented DBI in litigation concerning the proposed sale of the Stations. Mr. Butler last did substantive work for DBI a year to a year and a half prior to his testimony in this case. Mr. Butler has never represented Mr. Bramlett personally. Over a period of three years Mr. Butler was in contact with Mr. Bramlett on an average of at least once a week and has had periodic casual contacts with him since then. (DBI Ex. 11, p. 1; Tr. 696-99.)

100. In Mr. Butler's opinion, Mr. Bramlett's honesty and integrity are as high as anyone he has ever dealt with, both personally and professionally. Mr. Butler testified that in the course of his representation of DBI, when it would have been to Mr. Bramlett's advantage to shade the truth, Mr. Bramlett never suggested that be done. Mr. Bramlett was always open with the facts, good or bad. (DBI Ex. 11, p. 1; Tr. 703-04.) In Mr. Butler's words:

> If he didn't remember what occurred, he didn't remember what occurred. If something occurred that was adverse to whatever position we were pursuing, he told it that way. He never became[,] as witnesses sometimes do, advocates in attempting to shape their description of the facts to advocate their position. Whatever he remembered, he remembered. What he didn't remember, he didn't remember.

(Tr. 699-700.) Mr. Butler has heard people in the Huntsville/Decatur community discuss Mr. Bramlett and his reputation for honesty and integrity. Mr. Bramlett's reputation is outstanding, both with respect to his ability as an operator of a radio station and his honesty and integrity as a local businessman. (DBI Ex. 11, p. 2; Tr. 700-02.)

101. *Hundley Batts, Sr.* Mr. Batts, an African American, was born and raised in Huntsville, Alabama, and still resides there. Mr. Batts serves as a Commissioner of the Huntsville/Madison County Railroad Authority, and was a former Chairman of the Volunteer Center, an agency funded by the United Way, that handles volunteers for non-profit organizations. Mr. Batts has been an owner of WEUP(AM), Huntsville, Alabama, since the fall of 1987. (DBI Ex. 10, p. 1.)

102. Mr. Batts has known Mr. Bramlett since January 1988, and became personally acquainted with him in mid-1989. In January 1988 Mr. Bramlett provided helpful information concerning the operation of Station WEUP to Mr. Batts' program director, information with respect to the station's format and how to keep the music flowing. At that time Mr. Batts was surprised that Mr. Bramlett would help a competitor in the market. (DBI Ex. 10, p. 1.)

103. Mr. Batts sees Mr. Bramlett at least once a month and talks with him more frequently on the telephone. Mr. Batts relies on Mr. Bramlett as an advisor/mentor. In Mr. Batts' opinion, Mr. Bramlett is above and beyond reproach with respect to his honesty and integrity; "anything he tells you you can take to the bank." (DBI Ex. 10, pp. 1-2; Tr. 712.)

104. Mr. Batts is active in the radio broadcasting industry in the Huntsville/Decatur area and has been present at various functions and meetings when radio people have talked about Mr. Bramlett. According to Mr. Batts, Mr. Bramlett is thought of as a unique individual in terms of his fairness; since he struggled to become successful, he reaches out a helping hand to people. Mr. Bramlett has a reputation for honesty and great integrity; he brings integrity to the entire radio business in the Huntsville/Decatur area. (DBI Ex. 10, p. 1; Tr. 711.)

105. *B. Lynn Layton.* Mr. Layton is the sole owner of Lynn Layton Chevrolet in Decatur, Alabama. Mr. Layton is active in various community organizations, including the Rotary Club, and was on the Board of the Decatur Chamber of Commerce in the mid-1980's. (DBI Ex. 9, p. 1.)

106. Mr. Layton has known Mr. Bramlett for approximately 10 years. He meets with Mr. Bramlett as many as three or four times a month concerning advertising and promotions on the Stations. According to Mr. Layton, almost everybody active in the Decatur community knows Mr. Bramlett. Mr. Bramlett is civic minded; any time there is a community event, he is there donating his stations' time and services. Mr. Layton has never heard anything but praise for Mr. Bramlett's honesty and integrity. (DBI Ex. 9, p. 1.)

107. Mr. Layton could not think more highly of anyone. In his opinion, Mr. Bramlett is "straight up." Mr. Layton has never had a written contract with Mr. Bramlett. If Mr. Bramlett says something, that's the way it is in Mr. Layton's experience. In trade deals, when a product is provided in exchange for future time, it is important to be confident that the radio station will provide the agreed-upon time. Mr. Layton does not trade with any radio stations other than Mr. Bramlett's. (DBI Ex. 9, p. 1.)

108. Mr. Layton has been present at various times when Mr. Bramlett's name has come up in conversations. Mr. Bramlett's reputation among civic-minded business people in Decatur is that he is a man you can trust; he is honest, a man of integrity. (DBI Ex. 9, pp. 1-2.)

109. *Frank Allan Harris.* Mr. Harris is a resident of Old Hickory, Tennessee, and president and sole stockholder of Impact International, a manufacturer of lubricants. Mr. Harris served as Deacon of his church for many years and is in charge of his church's choir. (DBI Ex. 6, p. 1.)

110. Mr. Harris has known Mr. Bramlett since 1950-51 when they attended the sixth grade together in Falkville, Alabama, located just south of Decatur, Alabama. He currently sees Mr. Bramlett every month or two while travelling through Decatur, and Mr. Bramlett visits Mr. Harris in Nashville. Mr. Harris also talks to Mr. Bramlett frequently on the telephone. (DBI Ex. 6, p. 1.)

111. In Mr. Harris' opinion, Mr. Bramlett is a man whose integrity is absolutely impeccable. He believes Mr. Bramlett is honest, and there is not a person in the world other than his father and brother-in-law who have as much integrity. Mr. Harris would trust his life to Mr. Bramlett. Mr. Harris described one incident in ninth grade in support of his opinion. One week the teacher handed out tests which were to be completed and turned in. The next week the teacher returned the tests to each of the students to grade. Some days later he announced to the class that Mr. Bramlett and Mr. Harris were the only students who had honestly graded their papers and had not cheated. Apparently, all the other students made sure that they had all the correct answers. Unbeknownst to them, the teacher had graded the papers before he handed them back to the class. Mr. Harris testified that Mr. Bramlett would not cheat then and he knows he would not do that now. He believes Mr. Bramlett has inner strength and beliefs that have stayed with him throughout his life. (DBI Ex. 6, pp. 1-2.)

112. *Nathan W. Tate, Sr.* Mr. Tate is an African American who is a current employee of DBI. Mr. Tate has resided in Decatur, Alabama, all his life. He has been President of the Decatur-Morgan County NAACP since 1991, and was currently serving his second two-year term. (DBI Ex. 19, p. 1.)

113. Mr. Tate has been a friend of Mr. Bramlett's since the 1960's. In Mr. Tate's opinion, Mr. Bramlett is truthful and honest; if Mr. Bramlett tells you something, you can rely on his word. In addition, in the Decatur/Huntsville radio market and in the Decatur/Huntsville Black community, Mr. Bramlett is looked upon as a man of integrity. (DBI Ex. 19, pp. 1-2.)

114. *Ricky Patton.* Mr. Patton is an African American and a current and former employee of DBI. In Mr. Patton's opinion, based upon his experience with Mr. Bramlett over the last decade, Mr. Bramlett is an honest man. (DBI Ex. 8, pp. 1-2.)

CONCLUSIONS OF LAW

115. This proceeding involves the applications of DBI for renewal of its licenses for Stations WHOS(AM) and WDRM(FM), Decatur, Alabama. The Commission designated these license renewal applications for hearing because of various questions raised as a result of a Petition to Deny those applications and a *Bilingual* investigation into the EEO practices of the Stations conducted by the staff of the Mass Media Bureau's EEO Branch.

Issue 1 -- Misrepresentation/Lack of Candor

116. Issue 1 requires a determination of whether DBI made misrepresentations to or lacked candor with the Commission in responses to inquiries regarding DBI's EEO program. In specifying this issue, the Commission stated:

> In response to a Commission inquiry requesting recruitment and hiring information, the licensee asserted, and the VP/GM [Mr. Bramlett] confirmed under penalty of perjury, that the stations' EEO program was effective because 35% (7 of 20) of the

> hires during the license term were Black. In response to another Commission inquiry, the VP/GM again confirmed in a sworn declaration that the hiring figure was correct. It was not until responding to a fourth inquiry that the licensee disclosed a total of 104 hiring opportunities during the license term with only seven Black hires. While the accuracy of the contention that the stations had 20 hires during the license term was on its face dubious, the licensee and VP/GM, who had been in charge of the stations' EEO program throughout the entire license term, persisted in this contention when, in fact, there had been 104 hires. Because we must rely on truthful reporting by our licensees in assessing the success of an EEO program, we are particularly concerned when we find the actual number of hires is over five times greater than the number of hires repeatedly reported. Only after four inquiries did the licensee provide a reply that was seemingly accurate. Even that reply did not contain information regarding the recruitment sources contacted, the interviewee pool composition of each position or the referral source of each hiree as previously requested.

(*HDO* at para. 12; footnote omitted.)

117. It must also be determined whether there was a willful or repeated violation of Section 73.1015 of the Commission's Rules, and whether a forfeiture in an amount of up to $50,000 should be assessed against DBI. (*HDO* at para. 20.) Section 73.1015 provides, in pertinent part:

> No ... licensee ... shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

In a "Note" to this rule, it is emphasized that licensees have an obligation "in all instances to respond truthfully" to the Commission's requests for information.

118. While misrepresentations and willful omissions have always been proscribed by the Commission, in 1986 the prohibition was embodied for the first time in a rule, Section 73.1015, in order to allow the Commission greater flexibility to levy sanctions short of disqualification. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1233-34 (1986) (subsequent history omitted). In this connection, the Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance with the Commission's rules and policies. *Id.* at 1225-29.

119. The findings of fact establish, and it is concluded, that DBI did not respond to the Commission's inquiries in a complete, accurate, and truthful manner and that, consequently, DBI made misrepresentations to the Commission in violation of Section 73.1015 of the Rules. It is further concluded that the circumstances surrounding this rule violation establish that the misrepresentations were caused by gross negligence and wanton carelessness, rather than any intent to deceive.[10] They do not, therefore, rise to a level justifying the denial of DBI's renewal applications. However, the violations were repeated and sufficiently egregious so as to warrant the imposition of a $50,000 forfeiture, the maximum amount permitted by the *HDO*.

120. DBI's misrepresentations may be divided into three general categories. The first category related to the number of hires DBI had during the License Period. Thus, in DBI's April 18, 1991, response to the Commission's March 15, 1991, letter, DBI represented that from 1982 through February 1989, it had hired "approximately 20 new employees...." The accuracy of the number "20" was implicitly affirmed by DBI on two additional occasions, in its October 15, 1991, response to the Commission's October 7, 1991, letter, and in DBI's January 13, 1992, response to the Commission's January 2, 1992, letter. It is uncontroverted, however, that the actual number of total hires during the License Period was 104.

121. The second category of misrepresentation was made in connection with DBI's explanation for the discrepancy between the number of hires initially reported and twice affirmed, and the actual number of hires. In DBI's January 13, 1992, response to the Commission's January 2, 1992, letter, the inaccuracy of the number "20" was explained in terms of the Stations' inadequate records, and the ability to determine the actual number was attributed to the recent discovery of payroll lists. This explanation was repeated in DBI's February 7, 1992, response to the Commission's January 24, 1992, letter. This explanation was disingenuous. It is clear that the discrepancy between the number "20" and the actual number of hires was caused by Mr. Bramlett's lack of awareness or understanding, prior to December 1991, that the Commission had requested information about *all* hires during the License Period, not just minority hires. However, this was not the explanation the Commission was given.

122. The third category of misrepresentation concerned the Statements under penalty of perjury executed by Mr. Bramlett and submitted in support of DBI's April 18, 1991, October 15, 1991, January 13, 1992, and February 7, 1992, responses. In each of these Statements, Mr. Bramlett declared that he had read DBI's response, and that the facts contained therein were complete and accurate." Mr. Bramlett's Statements contained no qualifying language allowing for the possibility that he had not read, and was not sponsoring, the entire document. However, the record establishes beyond dispute that Mr. Bramlett read none of DBI's responses in its entirety; it simply was not his practice to do so. The record further establishes that not all of the "facts" contained in DBI's responses were "complete and accurate." It is also significant that this category of misrepresentation continued even after DBI voluntarily reported to the Commission the actual number of hires.

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[10] In this regard, the Commission has held in *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978), that gross negligence and wanton carelessness are functionally equivalent to an affirmative and deliberate intent to deceive and, consequently, the licensee's conduct herein constitutes a violation of Section 73.1015 of the Rules.

123. The cumulative effect of DBI's misconduct was to mislead the Commission for a prolonged period of time as to the true state of affairs with regard to DBI's EEO efforts. As a result, the Commission, which must of necessity rely on the truth, accuracy and completeness of its licensees' representations,[11] was repeatedly led to believe that DBI had hired a total of only 20 new employees during the License Period, and that 7, or 35 percent of those new hires were African American. Further, when DBI was finally able to provide the Commission with an accurate figure for the total number of hires, its explanation for the discrepancy was not completely candid. Moreover, this misconduct was exacerbated by the fact that all of the licensee's representations were supported by the Statements under penalty of perjury of Mr. Bramlett, a DBI principal, who, contrary to the explicit language of his Statements, did not read (or completely understand) the entirety of DBI's responses to the Commission's numerous inquiries.

124. DBI attributed its errors to innocent mistakes and misunderstandings arising from a failure of communication between Mr. Bramlett and Ms. Marshall, one of his attorneys. DBI claimed that Mr. Bramlett and Ms. Marshall "were like two ships passing in the night'" and "were on different wavelengths."[12] While there is some validity to this assertion, the ultimate responsibility for DBI's misconduct must rest squarely on the shoulders of Mr. Bramlett.[13] Specifically, the Commission's letters of inquiry were addressed to Mr. Bramlett, and he received them all. However, the record establishes that he did not read them in sufficient detail, if he read them at all, to discern exactly what information the Commission was seeking.

125. Similarly, the record establishes that Mr. Bramlett did not read or review DBI's responses with sufficient care to know or understand the entirety of the representations the licensee was making, or to know whether DBI was addressing all of the Commission's concerns. The Commission's letters were clear enough so that, had Mr. Bramlett read them carefully and thoroughly, he would (or should) have learned what information was required. Likewise, had Mr. Bramlett carefully and thoroughly read DBI's submissions, he would (or should) have discovered that they contained inaccuracies, misstatements, and/or were not wholly responsive.

126. The cause for this was Mr. Bramlett's practice at the time of signing anything his attorneys sent to him to sign, after only a cursory review. In this connection, the circumstances surrounding Mr. Bramlett's sponsorship of DBI's January 13, 1992, response to the Commission's January 2, 1992, letter are illustrative. Mr. Bramlett received a draft of the response prepared by Ms. Marshall on the afternoon of the day it was due to be filed and had about 20 minutes to review and return it to her. As a result, he only looked over one portion of the response, and admitted to having had no idea as to the meaning of the remainder of the document. Nevertheless, Mr. Bramlett signed a Statement under penalty of perjury attesting to the accuracy and completeness of the entirety of DBI's response.

127. Although DBI's misconduct was serious, it is concluded that such conduct does not rise to a level justifying the "ultimate sanction" of denial of its renewal applications. Numerous mitigating factors contribute to this conclusion. First, the record establishes, as shown above, that the misconduct resulted from gross negligence and wanton carelessness, not from any deliberate intent to mislead or deceive the Commission. Thus, in its January 13, 1992, response to the Commission's January 2, 1992, inquiry, DBI voluntarily disclosed the existence of over five times the number of hires during the License Period than had previously been reported to the Commission. Further, this response was filed after Mr. Van Horn, another of Mr. Bramlett's attorneys, advised him of the negative impact to which the additional disclosure could (and did) lead. It would have made no sense for Mr. Bramlett to have attempted to deceive the Commission by reporting only 20 hires, and then to have given up this ruse or changed his mind in January 1992 and reported that DBI hired over five times that number. The surest way to have exposed deception was to have done what DBI did. This scenario is completely inconsistent with an intent to mislead or deceive.

128. Second, the findings establish that there was no logical motive for DBI to have underreported the total number of hires during the License Period. The statistical guideline utilized by the Commission in evaluating the effectiveness of an EEO program is a comparison of the percentage of minority hires during the relevant period to the percentage of minorities in the applicable labor force. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, 3974 (1987) (subsequent history omitted). Under the so-called "50 percent of parity test," a licensee complies with the guideline if the percentage of minorities hired during the relevant period equals or exceeds 50 percent of the percentage of minorities in the applicable labor force. *EEO Processing Guidelines for Broadcast Renewal Applicants*, 46 RR 2d 1693 (1980) (subsequent history omitted). In the instant case, the labor force in the relevant area was 7.4 percent Black, and "50 percent of parity" equalled 3.7 percent. Under the worst-case scenario, assuming all 140 of DBI's hires during the License Period were "employees" for FCC purposes, the percentage of minority hires during that period (9 of 140, or 6.43 percent) substantially exceeded the 50 percent of parity benchmark. Moreover, assuming, as the Commission concluded in the *HDO*, that DBI hired

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[11] The Commission's demand for unalloyed candor is the *sine qua non* for licenseeship. This is so because it is primarily upon a licensee's uninvestigated representations that this agency must routinely rely. The Commission has an exceedingly limited budget and staff, and its everyday resources even for spot-checking are minuscule compared to the enormous industry under its purview. Practically the entire scheme of regulatory control is based, of utter necessity, on a system that presupposes the honor of the Commission's regulatees. *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990) (subsequent history omitted).

[12] DBI's Proposed Findings and Conclusions, at paras. 121 and 128.

[13] This is not meant to imply that DBI's attorneys bear no responsibility whatsoever for the misconduct. Portions of pleadings and statements were drafted which were not based upon fact, but upon unverified assumptions. Also, it does not appear that Mr. Bramlett was asked all of the "right" questions, that is, questions which would (or should) have elicited more accurate and complete answers to the Commission's inquiries.

104 "employees" during the License Period, the percentage of minority hires during that period (8 of 104, or 7.69 percent) exceeded 100 percent of parity. (*See* paras. 11-13, *supra*.

129. Third, it is concluded that DBI can be relied upon in the future to be truthful with the Commission and to comply with its rules and policies. DBI's violation of Section 73.1015 was not intentional, but was the product of gross negligence and wanton carelessness. It was also an isolated occurrence confined to a single FCC investigation. In this connection, DBI's record of compliance with the FCC's rules and policies over the last 20 years has been otherwise exemplary. Finally, the Presiding Judge has assessed Mr. Bramlett's credibility and has concluded that he testified truthfully and with complete candor, even when his testimony had a deleterious effect on DBI. Mr. Bramlett was genuinely contrite, and it is highly unlikely that the misconduct in question will be repeated. Under these circumstances, no useful purpose would be served by denying DBI's renewal applications. However, as noted above, DBI's misconduct was repeated and sufficiently egregious so as to warrant the imposition of a forfeiture in the amount of $50,000 for its violation of Section 73.1015 of the Commission's Rules.

Issue 2 -- EEO Program Issue

130. Issue 2 requires a determination of the extent to which DBI complied with the provisions of Section 73.2080(b) of the Commission's Rules. This rule requires licensees to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." To effectuate such a program, a licensee must, among other things, communicate its employment needs to sources of qualified applicants and solicit their recruitment assistance on a continuing basis, and conduct a continuing review of its employment practices and adopt positive recruitment measures to ensure genuine equality of opportunity. Sections 73.2080(b)(3) and (5) of the Rules. These basic obligations have existed since 1970. *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430, 435 (1970).

131. In specifying Issue 2, the Commission stated:

> Review of all submissions reflect that the licensee had 104 hiring opportunities during the license term. The licensee reported contacting seven general sources during the license term and receiving some minority applicants. However, the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term is unclear because the licensee reported recruitment and applicant data only for positions for which it considered and/or hired Blacks. The licensee has presented little evidence that it consistently contacted recruitment sources likely to refer minorities when vacancies occurred or that it evaluated its employment profile and job turnover against the availability of minorities in its recruitment area pursuant to Sections 73.2080(b)(2) and (3) of the Commission's Rules, 47 C.F.R. Sections [sic] 73.2080. It is unclear how it could meaningfully self-assess its EEO program, including the productivity of its recruitment sources as it claimed, with such limited and incomplete information. In addition, we question the licensee's self-assessment of its EEO efforts when, in one response, it argues the success of a program that resulted in the hiring of seven minorities out of 20 hires during the license term and, in a later response, still claims success although it had only recently discovered that it had 84 more hires than previously reported.

132. The findings of fact establish, and it is concluded, that DBI failed to comply with Section 73.2080(b) of the Commission's Rules. Thus, DBI did not dispute that there were deficiencies in its EEO program during the License Period. Specifically, DBI conceded that it failed to maintain adequate records documenting its recruitment efforts, failed to consistently contact recruitment sources likely to refer minorities when vacancies occurred, and failed to evaluate its employment profile and job turnover against the availability of minorities in its recruitment area. DBI also admitted that Mr. Bramlett had no formal evaluation process in place, and performed no statistical analysis of the Stations' EEO performance.[14]

133. On the other hand, there was not even the remotest scintilla of evidence that DBI or Mr. Bramlett ever discriminated against African Americans in their hiring or employment practices. Further, DBI's overall hiring of minorities during the entire License Period exceeded 100 percent of parity. In addition, Mr. Bramlett did attempt, albeit informally, to obtain minority applicants and to hire qualified minorities, and was attentive to his obligation to be nondiscriminatory in hiring. Although Mr. Bramlett did not formally evaluate DBI's EEO efforts, he authentically believed those efforts to be effective because the Stations did, in fact, hire qualified minorities.

134. Given the above, it is concluded that, on balance, DBI's violation of Section 73.2080(b) of the Rules does not warrant denial of its renewal applications. However, in order to allow the Commission to monitor DBI's EEO efforts, DBI's renewal applications will be granted for a "short term" with the imposition of EEO reporting conditions. *KDEN Broadcasting Co.*, 55 RR 2d 1311 (1984).

ULTIMATE CONCLUSION

135. In view of all of the foregoing, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of DBI's applications for renewal of the licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama. However, it is also ultimately concluded, for the reasons stated above, that DBI violated Sections 73.1015 and 73.2080(b) of the Commission's Rules. Consequently, DBI's renewal applications will be granted for a "short term" ending on January 1, 1995, subject to EEO reporting conditions, and a forfeiture in the amount of $50,000 will be assessed against DBI.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the applications of

[14] DBI's Proposed Findings and Conclusions, at paras. 134-35.

Dixie Broadcasting, Inc., for renewal of the licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama, ARE GRANTED for a "short term" ending on January 1, 1995, subject to the EEO reporting conditions specified herein.[15]

IT IS FURTHER ORDERED that Dixie Broadcasting, Inc., SHALL SUBMIT two reports containing the following information, the first report being due six months after this Initial Decision becomes final, and the second report being due on September 1, 1994, with the Stations' next renewal applications:

(a) a list of all persons hired as well as all persons who applied for each position filled (i) during the six months preceding the first report, and (ii) during the period between the first and second reports, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;

(c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and

(d) any additional information the licensee believes relevant regarding the Stations' EEO performance and efforts.

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of $50,000.

IT IS FURTHER ORDERED that, within 30 days after the date this Initial Decision becomes final, Dixie Broadcasting, Inc., SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 92-391; NOF Control No. FCC 93D-12," and be sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CRAIN BROADCASTING, INC. File No. BPH-870302MQ

For a Construction Permit
to modify the facilities of FM
Station WWUS, Big Pine Key, Florida

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1993; Released: July 2, 1993

By the Commission:

1. The Commission has before it an Application for Review ("Application") filed by Crain Broadcasting, Inc. ("Crain") on July 17, 1989. Crain seeks review of action by the Mass Media Bureau ("Bureau") which denied its request for a waiver of 47 C.F.R. §73.211(b). *See Letter to James Franklin from the Chief, FM Branch, Audio Services Division, Mass Media Bureau* (reference 8920-SBS), June 14, 1989. We deny the Application for the reasons set forth below.

2. *Background.* Crain is the licensee of FM Station WWUS, Big Pine Key, Florida. It seeks to avoid mandatory downgrading, pursuant to BC Docket 80-90, from Class C to Class C1 status.[1] Federal Aviation Administration restrictions and other governmental regulations, as well as the scarcity of land in the Florida Keys, combine to eliminate any practical opportunity in the Keys to construct a tower structure sufficient for a minimum (300 meter) Class C antenna height above average terrain ("HAAT"). Thus, Crain filed the captioned application requesting authorization to operate from a proposed tower with 620 kW effective radiated power ("ERP") at 135 meters. Alternatively, Crain asked for retention of full Class C protection with its existing facilities. Since the proposed power level exceeds the 100 kW Class C maximum, Crain requested the §73.211(b) waiver.[2]

3. Crain argued before the Bureau that maintaining Class C service is in the public interest, indicating that its station is the primary source for emergency information in the Keys, that its "deficient" signal in the upper Keys requires improvement, and that a downgrade to Class C1 status and the resultant reduced separations would lead to a service deterioration as new stations are established and existing ones modified. Crain further argued that there is precedent for a grant of its waiver request, citing the "Denver cases" and *Bayshore, New York* (*"Bayshore"*), 50 Fed. Reg. 10,768, 57 RR 2d 1275 (1985), *recon. denied*, 57 RR 2d 1652 (1986), an allotment rulemaking proceeding.

4. The Bureau held that the "Denver cases" and *Bayshore* were inapplicable to Crain's situation. The Bureau agreed with Crain that the Class C 100 kW power limit is predicated on the concept that increasing the ERP to achieve an increase in coverage will extend an interfering contour further than achieving the same coverage by increasing the HAAT. However, it determined that the fact that Crain's projected interfering contour would not exceed that of a Class C station operating at the 100 kW/600 meter HAAT maxima did not justify a grant of the requested waiver. According to the Bureau, a 100 kW facility generating an interfering contour equivalent to that proposed by Crain would provide a greater service area, and, thus, Crain's proposal would result in a less efficient utilization of the broadcast spectrum. Further, the Bureau noted that the Commission has denied requests to waive the power limit, even where actual coverage by a superpower station would be less than that which could be achieved utilizing the permitted ERP/HAAT combination, citing, for example, *Rock City Broadcasting, Inc.* (*"Rock City"*), 19 FCC 2d 558 (1969). Finally, the Bureau ruled that the lack of a suitable Class C site was not sufficient reason to forestall downgrading the station to Class C1 status.

5. *Application for Review.* Crain argues first that the Bureau failed to evaluate its waiver request in accordance with *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Citing *World's Fair-1982*, 89 FCC 2d 1374, 1379 (1982), and *Ponce TV Corp.*, 1 FCC Rcd 1167, 1176 (1986), Crain asserts that the applicable criteria are whether the policy underlying a rule would be circumvented by a waiver and whether the public would benefit.

6. Crain contends that grant of a waiver here would not undermine the policy underlying §73.211(b). According to Crain, the denial letter acknowledges this, since the resulting interfering contour will extend no further than that produced by a Class C station operating with maximum Class C facilities (100 kW ERP at 600 meters HAAT). Crain maintains that *Rock City*, and subsequent precedent actually supports its waiver request. The applicant asserts that, while the Commission declined to waive the power limit in *Rock City* because the same result could have been achieved by way of a directional antenna or height, there is no other means of improving WWUS' coverage and use of additional power is therefore appropriate. Crain cites *Golden West Broadcasters* (*"Golden West"*), 4 FCC Rcd 2097, 2099 (1989), as a situation where the Commission authorized a superpower operation, because existing city coverage was inadequate, and this was the best means of addressing the problem. It cites *Tri-Valley Broadcasting Co.* (WYRY-FM), (*"Tri-Valley"*), 4 FCC Rcd 4711 (1989), as a situation where, with no fully spaced site available, the need for emergency information justified a short spaced facility, even though the resultant interfering contour extended beyond what the Commission's Rules contemplated. Additionally, it asserts that all of this precedent involves waivers of rules forming an "integrated system" of rules

[1] *See Memorandum Opinion and Order*, 49 Fed. Reg. 10,264 (1984), *modifying* the *Report and Order* in Docket 80-90, 48 Fed. Reg. 29,486 (1983) (Class C stations required to construct facilities with 100 kW effective radiated power at an antenna height above average terrain of 300 meters or greater or be automatically downgraded to lower status).

[2] Pursuant to 73.211(b), the maximum power and height levels for Class C stations are 100 kW and 600 meters, respectively.

designed to ensure the integrity of the Commission's allocations system. In this regard, Crain argues that waiving the maximum power limit to improve coverage as in *Golden West* has the effect of extending service and interfering contours beyond a station's "allocations envelope" and that a similar result occurs where the spacing provisions are waived.

7. Crain's next argument is that its public interest showing was ignored by the Bureau. According to Crain, it cited authority for the proposition that mandatory reclassification to Class C1 status is inappropriate in situations where terrain anomalies render the Commission's propagation curves unreliable. Crain asserts that the "Denver cases" involved a recognition that disruption to existing service is a sufficient basis to avoid reclassification, even where sites are available from which full compliance with the Rules can be achieved. Crain maintains that the Bureau failed to follow the Commission's holding in *Bayshore*, that a power limitation waiver is appropriate where no site is available for a full height antenna and where a similar terrain anomaly would result in coverage beyond predictions. Crain also asserts that it demonstrated below that a grant of its proposal would not preclude any new allocation. Finally, Crain maintains that implicit in its proposal is the possibility of authorizing some lesser amount of power in combination with a directional antenna, something which was not addressed below. In this regard, Crain asserts that since WWUS' existing service contours extend "significantly" beyond what the Commission's propagation curves suggest, it requested that consideration be given to retaining the station's Class C status if the instant proposal could not be approved. According to Crain, retention would insure that existing WWUS service is not lost due to reduction in mileage separations based on a downgrading.

8. *Discussion.* Crain's reliance on the *Rock City* case is misplaced.[3] In *Rock City*, the applicant stressed the public interest benefits of ameliorating shadowing and multiple distortion problems by way of a waiver of the power limitations of 47 C.F.R.§ 73.213. 19 FCC 2d 558. As Crain observes, the Commission therein declined to waive the rule, in part because the same result could be achieved by means of a directional antenna or HAAT increase. Crain would have us hold here that, because there is no other means for it to achieve full Class C coverage, it should be permitted to use an ERP in excess of that prescribed in the rules. However, the Commission historically has refused to authorize excessive power levels in order to compensate for insufficient antenna heights. *See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas.*, 6 FCC Rcd 5456, 5361 (1991). *See also First Report and Order* in Docket No. 14185, 33 FCC 309, 337 (1962). Our recent decision in *Murray Hill Broadcasting Company*, 8 FCC Rcd _____ n.2 (1993), also reaffirms this principle.

9. The other cases cited by Crain are inapposite. In *Golden West*, which involved a grandfathered superpowered station, the Commission waived Section 73.211(b)'s power limit in order to permit the applicant to provide adequate city grade service to its community. Unlike *Golden West*, Crain does not claim that adherence to the rule will limit or disrupt WWUS' ability to adequately serve Big Pine Key. In *Tri-Valley*, the Commission waived the distance separation requirements of 47 C.F.R. §73.207 in a situation where no fully or lesser short spaced site was available, where only a minimum degree of interference would result, where the applicant was the only party capable of providing adequate emergency information about a nearby nuclear power facility, and where to require full spacing would result in deletion of a first local service. 4 FCC Rcd at 4713. The only similarity to Crain's situation is the alleged need for WWUS to provide emergency information. However, examination of Crain's proposal and Application reveals that, contrary to Crain's assertion, WWUS would not be the only station capable of providing emergency information to all Keys residents as well as a substantial number of tourists, even operating with 620 kW. FM stations WMCU, Miami, WCTH, Plantation Key, and WEOW, Atlantic Beach, Florida, in combination are capable of providing such information to *all* the Keys. In addition, FM Stations WLVE, Miami Beach, WKLG, Rock Harbor, WAVK, Marathon, and WAIL, Key West, Florida, in combination are able to provide service to most populated areas of the Keys, and all of the Keys are served by daytime AM stations.

10. The "Denver cases"[4] involved Bureau waivers of §73.313, the Commission's rule involving prediction of coverage. In that context, applicants sought to avoid the automatic downgrading provided for in BC Docket 80-90. Although the rule was waived in both cases for the purpose of computing antenna height above average terrain, the basis for waiver was that the portions of the terrain radials extending over the Rocky Mountains would improperly skew the calculated value of the stations' HAAT. The Bureau specifically noted in both decisions that all radials were to be utilized in computing the stations' predicted service contours.[5] The "Denver" applicants received no changes either in facilities or in allowable coverage, and these cases do not imply that the Commission will waive its maximum power limitation simply in order to allow a station to increase coverage to avoid a downgrade. Finally, in *Bayshore*, an allotment *rulemaking* proceeding, a channel was allotted despite predictions that city grade coverage would be unlikely in the face of environmental restrictions. It was recognized that the community of license might, in fact, receive an adequate signal because of a signal path over water near the transmitter site. However, no waiver was granted in that rulemaking proceeding, and it was merely suggested that waivers of 47 C.F.R. §§73.211 and 73.315 might be sought in the applications context. Moreover, no waiver of Section 73.211 was ultimately granted.

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[3] An analysis of Crain's Application reveals much emphasis on the concept of a station's "allocations envelope." Crain, however, references no applicable precedent in which the concept of an "allocations envelope" is specifically or metaphorically discussed. Rather, in each noted case the focus is considerably more narrow.

[4] *Letter to Ramsey L. Woodworth, Esq. and to John Wells King, Esq. from the Chief, Audio Services Division, Mass Media Bureau*, January 14, 1986 (reference 8920-MA), and *Letter to Malrite Radio & Television, Inc. from the Chief, Audio Services Division, Mass Media Bureau* ("*Malrite*"), June 11, 1987 (reference 8920-AED).

[5] Thus, Crain's argument that "terrain anomalies" in the Keys render the Commission's propagation curves unreliable carries no weight here.

Again, there is no indication that WWUS' coverage of Big Pine Key is inadequate, and Crain does not demonstrate that any such waiver grants were realized pursuant to any permit application.[6]

11. Crain's proposal would be extremely disruptive to the FM allotment scheme. It is true that in this case grant of Crain's proposal would not have a significant direct adverse preclusionary effect *vis-a-vis* new allotments or facilities changes.[7] However, Crain did not address the indirect preclusionary effect on new allotments resulting from channel changes among existing stations. Additionally, while Crain points out that its 34 dBu "interfering" contour would extend no further than that of a Class C station operating with maximum facilities, its 60 dBu *coverage* contour will extend 17 km less than that of a full Class C station; its coverage contour thus will extend to only 81% of that of a Class C station operating with maximum power and height according to the Rules. We believe it to be an inefficient utilization of spectrum to permit Crain to create as much interference potential as a Class C station with a coverage contour which extends only 81% as far.[8] We also note that Crain's proposal of extremely high power at a relatively low antenna height will greatly increase the risk of blanketing interference. *See* 47 C.F.R. § 73.318.

12. Finally, approval of the requested power level would treat WWUS differently than other similarly situated applicants. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In this regard, three former Class C stations, WEON, WOZN, Key West, Florida, and WCTH were recently downgraded to Class C1, as required by BC Docket 80-90, because they could not achieve minimum Class C facilities in compliance with the rules. Additionally, WCTH, along with two other Class C1 stations, WAIL and WWFT, Key West, Florida, meet the spacing requirements for Class C facilities. If Crain's proposal is granted, these stations could be expected to apply (after appropriate rulemaking) for Class C facilities, using Crain's grant as precedent to seek a similar exemption from the power limitation component of our FM allocation scheme. This would in effect vitiate that scheme in southern Florida and set a precedent for undercutting the allotment process in analogous circumstances throughout the United States. The possibility that some Class C stations such as WWUS would face difficulties in securing adequate sites was expressly recognized by the Commission in the context of BC Docket 80-90. Nevertheless, we specifically noted in providing for downgrading that such facilities would not lose service but could continue to provide service to their existing areas. 49 Fed. Reg. 10,260, paragraphs 9 and 15. To permit WWUS to extend its authorized coverage contours or, alternatively, allow retention of Class C status[9] despite the Commission's BC Docket 80-90 determination would amount to sanctioning the "warehousing" of spectrum. Such a result would, contrary to Crain's arguments, undermine Commission policy.

13. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed July 17, 1989 by Crain Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[6] In fact, no waivers of Section 73.211 were ultimately granted in that proceeding, but rather a blanket waiver of Section 73.315 was granted to those applicants proposing to locate their antennae on the Fire Island Lighthouse. *Warren Price Communications*, 2 FCC Rcd 4201, 4203 (M.M. Bur. 1987), *erratum*, 2 FCC Rcd 4452 (M.M. Bur. 1987).

[7] The Florida keys are so well-served that there is no room for new "drop-in" FM allotments, and these stations are adequately spaced such that Crain's proposal would appear to have no preclusionary effect *vis-a-vis* facilities changes.

[8] A Class C1 station operating with full facilities (100 kW at 300 meters) will have a predicted service contour at a distance of 72 km and a predicted co-channel interference contour at 172 km. Required spacings between such a C1 station and other stations are predicated, in part, on these distances. A Class C station operating with full facilities (100kW at 600 meters) will have a predicted service contour at a distance of 92 km and a predicted co-channel interference contour at 198 km. Consequently, the required spacings between such a Class C station and other stations are significantly greater than is the case for the Class C1 station. Crain's proposal for facilities of 620 kW at 135 meters would have a predicted service contour of 74 km and a predicted co-channel interference contour at 197 km. Granting WWUS' proposal would, in effect, apply the large Class C inter-station spacings, which were adopted in order to protect Class C service contours extending to as much as 92 kilometers, in circumstances where such service would not be provided and has no reasonable prospect for being established.

[9] Although Crain argues that an alternative to its specific proposal, such as a lesser power or a directional antenna, should have been considered below, Crain advanced no specific proposal, and to consider a proposal not advanced by an applicant would contravene Commission practice. Thus, the Bureau appropriately limited its consideration to the specific proposal before it. *See Palm Bay Public Radio, Inc.*, 6 FCC Rcd 1772, 1773 n.7 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-323

In the Matter of

Cincinnati Bell Telephone Company
Tariff F.C.C. No. 35

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: June 14, 1993; Released: July 2, 1993

By the Commission:

I. INTRODUCTION

1. On May 24, 1991, this Commission released an order[1] directing Cincinnati Bell Telephone Company (Cincinnati) to provide interexchange carriers (IXCs) non-discriminatory access to calling card validation data[2] about Cincinnati joint use calling cards.[3] Cincinnati had been providing such access exclusively to the American Telephone and Telegraph Company (AT&T). We ordered Cincinnati to file a report describing its compliance with the order. On June 24, 1991, AT&T filed a pleading captioned "Motion for Clarification or, in the Alternative, Reconsideration" (AT&T Petition), requesting that we either clarify that the *CBT Final Order* does not apply to its "non-subscriber" cards,[4] or that we reverse the order in its entirety.

2. On June 24, 1991, Cincinnati filed a "Compliance Report" describing its provision of access to validation data for Cincinnati joint use cards, but not non-subscriber cards. Cincinnati filed concurrently a "Motion for Clarification and Petition for Reconsideration" (Cincinnati Petition), seeking either clarification that the *CBT Final Order* does not apply to Cincinnati retroactively, or reconsideration of its retroactive application. Two parties filed motions to compel Cincinnati's compliance with that order with respect to non-subscriber cards,[5] and several parties filed oppositions to the Cincinnati and AT&T petitions.[6] USTA filed comments in support of AT&T's and Cincinnati's petitions on July 15, 1991.

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[1] Cincinnati Bell Telephone Company, Memorandum Opinion and Order, CC Docket No. 89-323, 6 FCC Rcd 3501 (1991)(*CBT Final Order).*

[2] Validation data include (1) the 10-digit telephone line number-based or Revenue Accounting Office (RAO)-based account number for a Cincinnati joint use card, (2) the 4-digit personal identification number (PIN) associated with the account, and (3) the updated presence or absence of those numbers in Cincinnati's database. *CBT Final Order,* 6 FCC Rcd at 3501. Cincinnati updates the database by adding or removing account numbers based on data available to Cincinnati regarding the status of the customer account to which the line-based or RAO-based number is assigned. *Id.* This information regarding the customer's account is gathered by Cincinnati in the course of providing its local exchange service and can only be generated by Cincinnati. Cincinnati would, for example, remove an account number if the cardholder's local exchange telephone service were terminated. Credit card calls made by Cincinnati's cardholders and collect or third party calls billed to Cincinnati subscribers cannot, as a practical matter, be placed or completed without access to this validation data. *See CBT Final Order,* 6 FCC Rcd at 3501, n.2 and text accompanying.

[3] Cincinnati joint use calling cards bear account numbers supplied by Cincinnati, may be used for the services of Cincinnati and an IXC, and are validated via access to data gathered by Cincinnati in the course of providing its local exchange service. *See CBT Final Order* 6 FCC Rcd at 3504.

[4] AT&T defined non-subscriber cards as those AT&T calling cards "issued by AT&T, with the assistance of Cincinnati as AT&T's contractor, to customers whose calling card billing arrangements have nothing to do with Cincinnati's local exchange carrier service." AT&T Petition at 1-2, 3-4.

[5] *See* Operator Assistance Network Motion to Compel (OAN Motion), filed July 3, 1991; "Joint Filers" Motion to Compel Compliance of Cincinnati Bell Telephone Company with the Commission's Order of May 24, 1991 (Joint Filers Motion)(Joint Filers comprised of Integretel, Inc., Nycom Information Services, Inc., Telesphere Communications, Inc., U.S. Long Distance, Inc., Americall Systems of Louisville, First Phone of New England, Inc., Competitive Telecommunications Association), filed July 2, 1991. *See also* Integretel, Inc. Comments on Motions to Compel, filed July 15, 1991; US Sprint Communications Company Comments on Motions to Compel, filed July 15, 1991. These motions and comments contained arguments essentially identical to those set forth by the parties in their Oppositions. Supporting and subsequent responsive pleadings also repeated the arguments made, and will not be separately described herein. *See, generally,* Cincinnati Opposition to Motions to Compel, filed July 17, 1991; Cincinnati Opposition to OAN's Motion to Compel, filed July 17, 1991; AT&T Opposition to Motions to Compel, filed July 17, 1991; OAN Reply to Oppositions, filed July 17, 1991; Joint Filers Reply to Oppositions, filed July 17, 1991.

[6] *See* Integretel, Inc. Opposition to Motion for Clarification and Petition for Reconsideration (Integretel Opposition to Cincinnati), filed July 15, 1991; Opposition of Integretel, Inc. to Motion of American Telephone and Telegraph Company for Clarification or, In the Alternative, Reconsideration (Integretel Opposition to AT&T), filed July 15, 1991; MCI Telecommunications Corporation Opposition (MCI Opposition), filed July 15, 1991; Capital Network System Inc. Opposition to Cincinnati's "Motion for Clarification and Petition for Reconsideration (CNS Opposition to Cincinnati), filed July 15, 1991; Capital Network System Inc. Opposition to AT&T's "Motion for Clarification or, In the Alternative, Reconsideration" (CNS Opposition to AT&T), filed July 15, 1991; Zero Plus Dialing, Inc. Opposition to Motion for Clarification or, In the Alternative, Reconsideration (Zero Plus Opposition), filed July 21, 1991; Opposition of the Competitive Telecommunications Association to Motion of American Telephone and Telegraph Company for Clarification or, In the Alternative, Reconsideration (Comptel Opposition), filed July 15, 1991; Opposition of Nycom Information Systems (Nycom Opposition), filed July 15, 1991; OAN Services, Inc. Opposition to Motions for Clarification and Reconsideration (OAN Opposition), filed July 15, 1991; US Sprint Communications Company Opposition to Motions for Clarification/Petitions for Reconsideration (Sprint Opposition) filed July 15, 1991.

3. On July 9, 1992, Cincinnati filed an "Updated Compliance Report," indicating that it had decided to remove its LEC joint use calling cards from the market because such cards would not be profitable due to Cincinnati's extremely small intraLATA toll calling area. Cincinnati stated that it would remove associated validation data from the Ameritech Operating Companies' line information data base (LIDB)[7] and notify Cincinnati joint use card customers that they will need to obtain calling cards from IXCs.[8]

4. By this Memorandum Opinion and Order on Reconsideration, we deny Cincinnati's petition, and deny in part and grant in part AT&T's petition. Specifically, we clarify that the *CBT Final Order* does not apply to AT&T's non-subscriber cards. We also deny the motions to compel compliance with respect to non-subscriber cards.

II. BACKGROUND

5. This proceeding began with Cincinnati's filing Transmittal No. 518 on March 17, 1989, which the Common Carrier Bureau suspended and investigated.[9] In the *CBT Final Order*, we concluded that Cincinnati's provision to IXCs of validation data for Cincinnati's joint use calling cards is an integral part of Cincinnati's provision of exchange access and is therefore subject to the requirements of Section 202(a) of the Act, 47 U.S.C. Section 202(a). We found no basis for distinguishing among various types of account numbers for purposes of Cincinnati's Title II obligations.[10] This Commission found further that Cincinnati's conversion of its line[11] or RAO-based[12] account numbers to the Card Issuer Identification (CIID) account numbering format[13] did not change the character of the information or Cincinnati's Title II obligation to provide IXCs with access to that account information. We concluded that Cincinnati must provide to all IXCs, in a manner consistent with Title II, the same access to its validation data that Cincinnati provides to AT&T.[14]

III. DISCUSSION

A. Non-Subscriber Calling Cards

1. AT&T Petition

6. AT&T requests clarification that the *CBT Final Order* does not apply to cards issued nationwide to customers such as students and military personnel who are not subscribers of Cincinnati's local exchange service. In the alternative, AT&T requests reconsideration and reversal of the order in its entirety. AT&T describes three types of cards for which Cincinnati provides services to AT&T. For the first two -- line number cards using Cincinnati local exchange telephone numbers and cards based on RAO codes assigned to Cincinnati -- AT&T explains that Cincinnati assigns the account number, maintains the account number in a database, and updates the database when Cincinnati determines, in the course of providing local exchange service to these customers, that the status of these customer accounts has changed. AT&T states that Cincinnati has complied with the *CBT Final Order* with respect to these cards.[15]

7. According to AT&T, the third type of card is issued to "non-subscribers" who do not obtain local exchange service from Cincinnati (*e.g.*, military personnel, students, and U.S. citizens living abroad). AT&T contends that, because these cards are issued to customers throughout the United States and abroad, Cincinnati does not and cannot provide validation data for these customers' accounts as a consequence of any Cincinnati local exchange carrier relationship with them. AT&T claims that AT&T itself solicits and processes the orders for non-subscriber cards and provides Cincinnati with the customer account status information, and that AT&T itself retains the responsibility for maintaining and updating account status information for these

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[7] The LIDB (line information data base) is a series of interconnected databases created by the LECs to enable them to share validation and screening data on a per call basis with each other and with IXCs. *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3533 (1992), *petition for recon. pending*, (*LEC Card Practices Order*).

[8] The Data Base Administration System (DBAS) was a database owned, operated and maintained by Cincinnati, containing customer account data gathered by Cincinnati in the course of providing local exchange service. Cincinnati transferred the customer record information in the DBAS over dedicated lines to AT&T's Billing Validation System (BVA) on a nightly basis. AT&T consulted the DBA database via its signalling network to validate credit cards issued by Cincinnati. *See* Cincinnati Bell Telephone Company, Memorandum Opinion and Order, CC Docket No. 89-323, 5 FCC Rcd 805, 808 (1990)(*Investigation Order*). Cincinnati now provides validation information through Ameritech's LIDB. *See* Cincinnati Updated Compliance Report at 3. Cincinnati has indicated that its use of DBAS to update AT&T's BVA was terminated on May 14, 1992. *Id.*

[9] *See* Cincinnati Bell Telephone Company, Transmittal No. 518, 4 FCC Rcd 5033 (Com. Car. Bur. 1989)(*Suspension Order);* CC Docket No. 89-323, 4 FCC Rcd 5735 (Com. Car. Bur. 1989)(*Designation Order);* 5 FCC Rcd 805 (1990)(*Investigation Order*).

[10] *See CBT Final Order*, 6 FCC Rcd at 3503.

[11] Line-based numbers, which are based on local exchange telephone numbers, are comprised of a three-digit area code derived from the North American Numbering Plan, followed by seven digits originated by Cincinnati, followed by four digits (the PIN) supplied at random by Cincinnati through Cincinnati Bell Information Systems (CBIS) or requested by a customer.

[12] The Revenue Accounting Office, or RAO-based, number consists of three digits assigned by Bell Communications Research (Bellcore) to Cincinnati, followed by seven digits originated by Cincinnati, followed by a four-digit PIN generated by CBIS either at random or at a customer's request.

[13] CIID cards bear 14 digits, the first six of which identify the IXC issuing the card. The identifying code allows a carrier to validate directly for queries made to the card issuer's database. The CIID numbering plan was developed by Bellcore in response to an MFJ Court requirement. *See U.S. v. Western Electric Company, Inc.*, 698 F. Supp. 348 (D.D.C. 1988).

[14] Because the record in the Cincinnati proceeding provided only limited information about the calling card practices of other local exchange carriers (LECs), this Commission initiated a rulemaking seeking specific information on LEC card practices and proposing requirements for LECs who provide IXCs access to validation data and services for LEC joint use calling cards. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991)(*Notice);* Report and Order and Request for Supplemental Comment, CC Docket No. 91-115, 7 FCC Rcd 3528 (1992)(*LEC Card Practices Order*).

[15] AT&T Petition at 2-3.

customers.[16] AT&T notes that all non-subscriber cards are issued in the CIID format, using CIID codes assigned to AT&T by Bellcore.[17]

8. AT&T argues that non-subscriber cards do not fall within the definition of Cincinnati joint use cards because Cincinnati's local exchange operations are irrelevant to the non-subscribers who hold these cards.[18] AT&T claims that Cincinnati's sole function with respect to these cards consists of conventional billing and related data processing and storage activities.[19] As an alternative to clarifying that non-subscriber cards are not Cincinnati joint use cards within the meaning of the *CBT Final Order*, AT&T requests reconsideration.[20]

2. Oppositions to AT&T's Petition

9. Several parties argue that the Commission should treat AT&T's non-subscriber cards as Cincinnati joint use cards and urge us to affirm that the validation data for non-subscriber cards is subject to Title II.[21] These parties state that the *CBT Final Order* applies to all cards based on Cincinnati's RAO numbers. They argue that Cincinnati's involvement in the assignment of account numbers and maintenance of validation data for non-subscriber calling cards demonstrates that these calling cards are Cincinnati joint use cards.[22]

10. Sprint argues that AT&T fails to detail the arrangements between AT&T and Cincinnati concerning AT&T's non-subscriber cards, and accuses AT&T of hairsplitting.[23] Sprint argues that if the *CBT Final Order* applies only where the account status information underlying the validation data is the product of Cincinnati's local exchange activities, AT&T could eviscerate the order by fragmenting the responsibilities of its LEC partners for joint use cards.[24] Sprint questions the fact that AT&T uses Cincinnati, rather than some other company, to feed AT&T-generated account status information into AT&T's own BVA system, and concludes that AT&T's use of Cincinnati must be attributable to Cincinnati's local exchange service.[25]

11. Comptel, Integretel, Nycom and Zero Plus argue that AT&T's non-subscriber cards fall within the description in the *CBT Final Order* of reclassified CIID cards, which the Commission specifically found to be subject to Title II.[26] These parties contend that Cincinnati is, as a technical matter, inextricably involved in database and billing administration whether or not a CIID card customer is a Cincinnati subscriber.[27] The opposing parties argue that AT&T should be barred from seeking special treatment for non-subscriber cards because AT&T never distinguished these cards during the proceeding, despite relevant discussion in the comments of other parties.[28]

12. Finally, the parties dispute AT&T's contention that Cincinnati's activities concerning AT&T's non-subscriber cards are not subject to Title II under the standards set forth in the *Billing and Collection Detariffing Order*. Comptel and Integretel argue that the Commission expressly distinguished Cincinnati's calling card activities from the preparation or mailing and collection of customer bills that were subject to the *Billing and Collection Detariffing Order*.[29]

3. AT&T's Reply

13. AT&T states that its Petition primarily seeks to clarify that the *CBT Final Order* does not apply to its non-subscriber cards on the ground that those cards are not within the order's definition of Cincinnati joint use cards.[30] In particular, AT&T argues that the order defined Cincinnati joint use cards as line and RAO-based cards validated with "information regarding the customers account which Cincinnati gathers in the course of providing its local exchange service."[31] AT&T contends that, as no commenter disputes, non-subscriber cards are not validated using data obtained by Cincinnati in the course of providing local exchange

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[16] *Id.* at 3-4.
[17] *Id.* at 3 n.5*.
[18] *Id.* at 6.
[19] *Id.* at 7.
[20] AT&T also raises other arguments but, given our disposition of the case, we need not resolve them. For instance, AT&T argues that the calling card functions performed by Cincinnati for AT&T relating to non-subscriber cards are not subject to Title II under the standards set forth in Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986)(*Billing and Collection Detariffing Order*), and other Commission decisions because such activities are not communications services as defined in those decisions. AT&T also contends the Commission did not comply with the notice and comment requirements of the Administrative Procedure Act by failing to provide notice that an order requiring access to any validation data was under consideration. In addition, AT&T contends there was no specific notice that non-subscriber cards and cards in the CIID format were at issue. Finally, AT&T asserts that the Commission failed to compile an adequate record with respect to non-subscriber cards and cards in the CIID format. *Id.* at 7 n.**.
[21] *See, e.g.*, Sprint Opposition at 4; Nycom Opposition at 10-13; Comptel Opposition at 12-18; Integretel Opposition to AT&T at 4-9; Zero Plus Opposition at 4-7; CNS Opposition to AT&T at 2-4; MCI Opposition at 2.
[22] *See, e.g.*, Integretel Opposition to AT&T at 6-8. In particular, Integretel states that Cincinnati concedes (1) that the cards are all based on RAO codes assigned to Cincinnati by Bellcore, (2) that Cincinnati provides, through its affiliate CBIS, the system processing for non-subscriber card accounts, (3) that maintenance, development and modification of the AT&T non-subscriber card database are performed by CBIS, (4) that Cincinnati, through CBIS, assigns almost all of the non-subscriber card PIN numbers, (5) that validation data for non-subscriber cards is maintained in the Cincinnati DBAS for updating of AT&T's BVA, and (6) that non-subscriber card bills are generated by CBIS. *See also* Comptel Opposition at 12-16; Nycom Opposition at 9-10. CNS adds that Cincinnati actively solicits the issuance of AT&T non-subscriber cards. CNS alleges that Cincinnati personnel automatically direct callers seeking non-subscriber cards to contact AT&T, and do not direct them to any other IXC. CNS Opposition at 3.
[23] Sprint Opposition at 3.
[24] *Id.* at 4.
[25] *Id.* at 4-5.
[26] Comptel Opposition at 12-14; Integretel Opposition to AT&T at 5-6; Nycom Opposition at 11-12; Zero Plus Opposition at 5-6.
[27] *See, e.g.*, Integretel Opposition to AT&T at 8.
[28] Integretel Opposition to AT&T at 3-4, 9-13; Comptel Opposition at 8-12; Nycom Opposition at 3-9; MCI Opposition at 3.
[29] Comptel at 19-20; Integretel Opposition to AT&T at 17.
[30] AT&T Reply at 1.
[31] *Id.* at 2, *citing CBT Final Order*, 6 FCC Rcd at 3501, n.2, 3503.

service.[32] AT&T argues that Cincinnati's (and CBIS's) activities with respect to non-subscriber cards do not justify classifying them as Cincinnati joint use cards, because the validation data for non-subscriber cards are provided by AT&T.[33]

14. AT&T argues that it was under no obligation to make submissions regarding non-subscriber cards during the proceeding, because the terms and purpose of the *Order*, as well as the Commission's announcements preceding the *Order*, excluded calling cards issued by AT&T to persons with whom Cincinnati has no LEC relationship, such as non-subscriber cards.[34] According to AT&T, Cincinnati's activities related to non-subscriber cards are not communications services under Title II, and are indistinguishable from the financial and administrative services, including recording and aggregating billing data services, described in the *Billing and Collection Detariffing Order*.[35] AT&T continues to maintain that non-subscriber cards were not at issue in this proceeding.[36]

4. Discussion

15. Our regulation of access to validation data for Cincinnati's joint use cards is based on our jurisdiction over interstate common carrier communications under Title II of the Communications Act. We observed in the *CBT Final Order* that validation data for Cincinnati's joint use cards can be generated only by Cincinnati in the course of providing local exchange service. Because we determined that provision of validation and screening services for these cards was an integral part of Cincinnati's provision of exchange access, and therefore subject to the non-discrimination requirements of Section 202(a) of the Act, we ordered Cincinnati to make this service available to any IXC on a non-discriminatory basis. Although we reviewed in considerable detail in the order the process by which Cincinnati generated and assigned card account numbers, we concluded that the primary significance of the card numbering sequence lay in its association with the account information necessary to inform the inquiring carrier that an authorized user seeks to place a call with a valid calling card. We also determined, on the record before us, that AT&T's conversion of Cincinnati joint use cards from line or RAO-based numbers to CIID numbers did not justify a different legal result.[37]

16. We refined our jurisdictional analysis in our Report and Order in the LEC card practices proceeding. In that proceeding, we adopted rules governing the Title II obligations of LECs with respect to IXC access to validation data for the LECs' joint use calling cards.[38] We concluded that our jurisdiction over access to validation data for LEC joint use cards arose from the nexus between the LECs' provision of local exchange access service and the validation data for LEC joint use cards. The LECs' validation databases contain information indicating that (1) the card number and PIN are correct, (2) the cardholder's account is current and (3) the message can be billed to that account.[39] This information is not severable from the underlying local exchange access service -- if a subscriber fails to pay for or changes local exchange access service or if the LEC reassigns the cardholder's telephone line number, the LEC modifies the database to remove the old account number.[40] It is the card account number's presence in or absence from the LEC's database which informs the IXCs of the card's validity.

17. By definition, validation data for non-subscriber card accounts lack this nexus with local exchange access service. The information regarding the status of the cardholder's account does not reflect payment or non-payment of the cardholder's local exchange service bill. While Cincinnati contended below that furnishing a 10-digit line or RAO number is an activity subject to Title II, our jurisdictional analysis in the *CBT Final Order*[41] and the *LEC Card Practices Order* [42] clarifies that this activity alone is not the basis for our Title II jurisdiction over access to LEC joint use card validation data. AT&T and Cincinnati contend that the validation data for non-subscriber cards are gathered and controlled by AT&T and are entirely unrelated to Cincinnati's local exchange service. Therefore, they lack a nexus with Cincinnati's local exchange access service. The opposing parties have not provided any evidence to the contrary indicating that Cincinnati gathers validation data for AT&T's non-subscriber cards in the course of providing Cincinnati's local exchange service. Therefore, we conclude that the non-subscriber cards at issue here are not subject to our validation access requirements. Accordingly, we do not require Cincinnati or AT&T to make validation data for these card accounts available to all IXCs on a non-discriminatory common carrier basis.

B. Retroactive Application of CBT Final Order

1. Cincinnati Petition

18. Cincinnati seeks clarification that the *CBT Final Order* does not apply retroactively. Cincinnati contends the order is not clear as to whether the order's finding that Cincinnati violated Title II is prospective or retroactive: the language of the order concludes that Cincinnati's actions are "in violation" and that "CBT's practice violates Title II's prohibition," yet states in language denoting prospective action only that Cincinnati "must comply" and that Cincinnati "is required to provide [access to validation data] to all IXCs..."[43] Cincinnati argues that retroactive application of the order would violate due process because the Commission cannot "adjudicate violation of a rule which did not exist prior to the adjudication" or adopt a rule of potentially broad application and apply it retroac-

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[32] AT&T Reply at 2. AT&T also contends that non-subscriber cards, even before they were converted to the CIID format, were not validated with data obtained by Cincinnati in the course of providing local exchange service. *Id.* at 2 n.****.

[33] *Id.* at 3, 4.

[34] *Id.* at 4. n.***.

[35] *Id.* at 5. n.*, *citing Billing and Collection Detariffing Order*, 102 F.C.C. 2d at 1168-69.

[36] *Id.* at 6-8.

[37] *CBT Final Order*, 6 FCC Rcd at 3504.

[38] *See LEC Card Practices Order*, 7 FCC Rcd 3528.

[39] *Id.* at 3544 and n.178.

[40] Failure to pay for calling card services also results in removal of an account from the validation database. *See id.* at 3531.

[41] *See CBT Final Order* at 3502.

[42] *See LEC Card Practices Order* at 3530.

[43] Cincinnati Petition at 9.

tively to one carrier only.[44] Cincinnati contends that the Commission announced for the first time in the *CBT Final Order* that certain credit card validation functions are Title II activities, then acknowledged the impropriety of its "*ad hoc* rulemaking" by initiating a rulemaking proceeding before applying the same rule to any other carrier.[45] Cincinnati also contends the holding of the order is directly contrary to the FCC's orders detariffing billing and collection services.[46] Cincinnati also complains that the order is unfair, discriminatory and arbitrary.[47] Cincinnati requests that we clarify that the requirements of the order apply to Cincinnati following a reasonable implementation period after the order.[48]

2. Oppositions to Cincinnati's Petition

19. Five parties opposed Cincinnati's petition,[49] including OAN and Integretel, who have filed Section 208 complaints against Cincinnati.[50] The opposing parties characterize Cincinnati's petition as an attempt to avoid liability for violations of Section 202 of the Act, and urge the Commission not to give Cincinnati immunity by granting its petition.[51] OAN argues that the order is not prospective in nature, either by its language or intent.[52] OAN also argues that the order was not adopted pursuant to general rulemaking procedures, did not create a new rule, and did not make a previously permissible activity unlawful.[53] OAN asserts that the Commission has the discretion to proceed by either adjudication or rulemaking, and that what OAN refers to as adjudication was the appropriate course in this case for "the determination of past and present rights and liabilities."[54]

20. OAN argues that in this case a complete failure to tariff a service has been found unlawful, and the Commission could not deny third parties damages even if the practice had been declared unlawful in a general rulemaking intended to have only prospective effect.[55] In a similar vein, Integretel points out that with carrier-initiated tariffs, carriers bear the risk that they will be liable if their tariffs are later determined by the Commission to be unlawful. Integretel notes that courts have upheld Commission findings that the practices of a single carrier are unreasonable in violation the Act, even where there were no prior Commission rules prohibiting the specific conduct.[56]

21. OAN contends further that the initiation of our general rulemaking to examine the calling card practices of other LECs does not affect the validity of the tariff investigation.[57] OAN also argues that Cincinnati had ample notice of the scope of the proceeding and cannot reasonably claim surprise.[58]

3. Discussion

22. This investigation was conducted pursuant to Sections 204(a) and 205 of the Communications Act. It was initiated to determine whether Cincinnati's provision of validation information exclusively to AT&T was unreasonably discriminatory in violation of Sections 201(b) and/or

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[44] *Id.* at 10.
[45] *Id.*
[46] *Id.* at 11.
[47] *Id.* at 11-13.
[48] *Id.* at 14.
[49] These parties include CNS, Sprint, Nycom, OAN and Integretel.
[50] *See* Integretel, Inc. v. Cincinnati Bell Telephone Company, File No. E-92-106, complaint filed September 4, 1992; OAN Services, Inc. v. Cincinnati Bell Telephone Company, File No. E-91-104, complaint filed June 18, 1991.
[51] *See, e.g.,* Integretel Opposition to Cincinnati at 11-12; OAN Opposition to Cincinnati at 4-5; Nycom at 14.
[52] OAN Opposition to Cincinnati at 3.
[53] *Id.* at 5-6; *accord,* CNS Opposition to Cincinnati at 3-4.
[54] OAN Opposition to Cincinnati at 9, *citing Telocator Network of America v. FCC,* 691 F.2d 525, 551 (D.C. Cir. 1982); *accord,* Integretel Opposition to Cincinnati at 8; Sprint Opposition at 9-12. This proceeding, as all tariff investigations, is a rulemaking of particular applicability, not an adjudication. *See* 5 U.S.C. § 551(4).
[55] OAN Opposition to Cincinnati at 11.
[56] Integretel Opposition to Cincinnati at 9-11.
[57] OAN Opposition to Cincinnati at 11-12; *accord,* Nycom Opposition at 15-16.
[58] OAN Opposition to Cincinnati at 13-14.

202(a) of the Act.[59] We concluded that Cincinnati's calling card practices were unreasonably discriminatory, in violation of Sections 201(b) and 202(a).[60]

23. Under Section 205 of the Act, if the Commission finds after investigation that a carrier practice is unlawful, we can proscribe that practice in the future. That is precisely what the *CBT Final Order* did. That such relief, by its nature, can be prospective only, however, does not foreclose parties who have been harmed by the unlawful practice from seeking reparations under Section 208, 47 U.S.C. Section 208, for conduct engaged in prior to the proscription. Cincinnati's liability, if any, for the period preceding our decision in the *CBT Final Order* is properly resolved in a Section 208 complaint proceeding. We do not believe it is appropriate on this record to resolve such liability questions in this proceeding.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Motion for Clarification and Petition for Reconsideration filed by Cincinnati Bell Telephone Company IS DENIED.

25. IT IS FURTHER ORDERED that the Motion for Clarification or, In the Alternative, Reconsideration filed by American Telephone and Telegraph Company is GRANTED IN PART, and DENIED IN PART, as provided herein.

26. IT IS FURTHER ORDERED that the Motions to Compel filed by Operator Assistance Network and Joint Filers ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[59] *See Suspension Order*, 4 FCC Rcd at 5033; *Designation Order*, 4 FCC Rcd at 5736.
[60] *See Investigation Order*, 5 FCC Rcd at 809.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-179

In the Matter of

Price Cap Regulation of
Local Exchange Carriers

Rate of Return Sharing
And Lower Formula Adjustment

NOTICE OF PROPOSED RULEMAKING

Adopted: June 18, 1993; **Released: July 6, 1993**

Comment Date: August 2, 1993
Reply Date: September 1, 1993

By the Commission:

I. INTRODUCTION AND SUMMARY

1. Under the Commission's price cap plan, a local exchange carrier's (LEC's) interstate rate of return in one year can be the basis for adjustments to that carrier's price cap indexes in the following year. This rate of return "backstop" is intended to tailor the plan to the circumstances of individual LECs, while assuring that customers share in productivity gains. In order to preserve the efficiency incentives of price caps, this adjustment to the indexes applies only to the next year's allowable rates, and only if the LEC's rate of return falls outside a broad range around the rate of return used to begin LEC price caps, 11.25 percent. The LEC generally begins to share half of its earnings with customers beginning at a 12.25 percent rate of return; all earnings above 16.25 percent are returned to customers through this adjustment. Similarly, at the low end, if the LEC's earnings fall below 10.25 percent, an upward adjustment in the price cap indexes is permitted in the following year.

2. LEC price cap rates took effect on January 1, 1991, and the first application of this sharing and lower adjustment mechanism occurred in the annual 1992 access tariff filings, which were filed in April 1992 and took effect on July 1, 1992. LECs with rates of return above 12.25 percent during 1991 lowered their price cap indexes by a total of $76.8 million to share earnings. LECs with rates of return below 10.25 percent increased their indexes by a total of $96.6 million.

3. In the annual 1993 access tariff filings, an issue has arisen as to how such sharing and lower end adjustments to the price cap indexes should be reflected in the rate of return used to determine sharing and lower formula adjustments in the following year. Some price cap LECs have proposed that the rate of return used to compute this year's backstop adjustments should include the effects of last year's backstop adjustment. This approach would reduce sharing amounts this year for LECs who were subject to sharing last year. However, under rate of return regulation we have required LECs to "add-back" an adjustment for rate of return-based refunds from prior periods. "Add-back" would also increase the lower end adjustment, and thus permit higher rates, for LECs who received that adjustment last year.

4. Our review of the LEC price cap plan, and the rules and orders implementing it, indicates to us that the amounts of the backstop adjustments should probably not be included when computing the rates of return used to determine sharing and lower end adjustments in the following year. As we discuss below, we believe that "add-back" is more consistent with the price cap plan as it was adopted. However, we recognize that this issue was neither expressly discussed in the LEC price cap orders nor clearly addressed in our Rules. "Add-back" also poses implementation issues that it may be useful to air and resolve now that the first tariffs raising this issue are before us. Accordingly, we are establishing this docket to seek comment on the tentative conclusion discussed below, and on proposed rule changes, to incorporate "add-back" clearly into the LEC price cap rules.

II. DISCUSSION

A. Add-Back In Rate of Return Regulation

5. Under rate of return regulation, LECs refund overearnings above the prescribed maximum allowable rate of return, whether through direct payments to customers, rate reductions in a subsequent tariff filing period, or damages awarded after complaints. Because the rate of return prescription applies to a LEC's performance and rates within a specific monitoring period, we have required LECs to treat refund payments as adjustments to the period in which the overearnings occurred, rather than to the period in which the refund is paid.[1]

6. This approach is implemented by including a line-item on the rate of return monitoring report, Form 492, which displays the amount of refunds associated with prior enforcement periods.[2] The refunds are then "added back" into the total returns used to compute the rate of return for the current enforcement period.[3] The net rate of return after add-back is then used to determine compliance with the prescribed rate of return during the new enforcement period, and to compute the amount of any refund obligation.[4]

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[1] Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, CC Docket No. 86-127, 1 FCC Rcd 952, 956-57 (1986).

[2] *Id.* at 960-961, Appendix C.

[3] Section 65.600 of the Commission's Rules, 47 C.F.R. Section 65.600.

[4] Sections 65.700-03 of the Commission's Rules, 47 C.F.R. Section 65.700-03.

B. The Rate of Return Backstop in the LEC Price Cap Plan

7. A pure price cap plan seeks to establish reasonable rates by capping prices rather than profits. For example, in our AT&T price cap plan maximum prices are limited by a formula that adjusts the price cap indexes (PCIs) annually based on inflation and a productivity target, not the carrier's own costs.[5] The Commission was concerned, however, that a pure price cap plan might produce unintended results as applied to the many individual LECs and their varying operational and economic circumstances.[6] For this reason, the Commission included a rate of return-based backstop mechanism in the LEC price cap plan. The plan retains productivity incentives by allowing LEC earnings to vary within a wide range around the initial 11.25 percent rate of return. Outside that range, the sharing and lower formula adjustment apply to adjust the price cap index.[7]

8. We anticipated that the backstop would operate in much the same way as rate of return enforcement for LECs still subject to rate of return regulation. Rates of return would continue to be calculated and reported in essentially the same manner.[8] Where we found that changes in the application of the rate of return were appropriate, we specifically adopted them. These changes included the wider range of earnings, the exclusion of the LEC price cap earnings thresholds from the rate of return represcription process, and the deletion from earnings reports of information not needed under the price cap plan.[9]

9. We adopted the sharing and lower end adjustment mechanisms both as rules and prescriptions, similar to the prescription applied to rate of return carriers.[10] We also made clear that we expected the mechanisms to enforce the earnings limits we had adopted, in order to assure that rates would remain within a range of reasonableness, and that particular LECs could not retain unusually high earnings that were not necessarily tied to increases in productivity. Section 61.45(d)(2) requires that price cap LECs "shall make such temporary exogenous cost changes as may be necessary to reduce PCIs to give full effect to any sharing of base period earnings required by the sharing mechanism...." *See also* Section 61.45(d)(1)(vii).

C. The Add-Back Issue for the Price Cap Backstop

10. Our initial review of the record does not indicate that any commenters in the LEC Price Cap rulemaking or in the subsequent reconsideration proceeding discussed the details of rate of return calculations, or requested that we eliminate add-back from the rate of return calculations of the LEC price cap plan. In discussing and adopting changes in rate of return monitoring and reporting, we also did not indicate that the add-back provisions in Form 492, which is used to report returns, were to be changed.

11. We have also examined the effects of add-back and believe that it continues to be an appropriate and indeed probably necessary component of the backstop. First, as we discussed in the *LEC Price Cap Order*, the price cap plan is intended to create incentives for productivity growth. Changes in rate of return each year are used as a measure of productivity growth relative to the price cap target. The amounts of sharing or lower formula adjustment implemented in one year, however, relate to productivity performance in a prior year. Thus, unless add-back occurs, the relationship between rate of return and productivity growth becomes hidden.

12. Second, without add-back, artificial swings in earnings can occur. As the example in Appendix A illustrates, the use of unadjusted rates of return for backstop calculations create a "see-saw" effect on earnings, even if the carrier's operational performance was the same each year. This can occur because the unadjusted rate of return effectively double-counts the amount of the backstop adjustment, once in the base year and then again in the tariff year.

13. Third and most important, add-back appears necessary to the rate of return thresholds applied to determine price cap LECs' sharing obligations and lower adjustment right are those we intended. The price cap plan gives the LECs substantial flexibility in their rates and earnings, to encourage greater efficiency. However, for the LECs the Commission established limits on this flexibility and a range of reasonableness for LEC earnings. Without add-back, the double-counting of backstop adjustments could effectively permit earnings outside the range of reasonableness we designated. LECs would share less of their earnings as they approach or exceed the high end of the range, and would receive smaller adjustments when they fell below the low end of the range. In both cases, the effective rate of return over time could fall outside the range of returns we judged to be reasonable. Rates of return would not be limited to the 16.25 percent maximum we established for LECs electing a 3.3 percent productivity factor, nor would earnings below 10.25 percent be adjusted upward to 10.25 percent. This effect is illustrated in the examples in Appendix A. The examples also show that this discrepancy could be quite significant. In the current annual access tariff filings, use of the unadjusted rate of return for computing this year's backstop adjustments would permit rates of return that would be on average 0.2 percent higher at the upper end, and 0.5 percent lower at the low end than the adjusted rate of return. For individual LECs, the effect is often greater still, as much as 2.0 percent above and 0.9 percent below the rate of return calculated without the adjustment.[11] The add-back adjustment corrects these deviations and sets the backstop rate of return limits at the levels we selected in the *LEC Price Cap Order*.

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[5] Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2922-33 (paras. 100-114) (1989) (*AT&T Price Cap Order);* Erratum, 4 FCC Rcd 3379 (1989).

[6] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6801 (1990) (*LEC Price Cap Order*).

[7] For LECs who elect a productivity factor of 3.3 percent during the tariff year, the 50 percent sharing obligation begins for rates of return above 12.25 percent, and 100 percent sharing begins at 16.25 percent. For LECs who elect the more challenging 4.3 percent productivity factor, 50 percent sharing begins for rates of return above 13.25 percent, and 100 percent sharing begins at 17.25 percent. The lower formula adjustment remains at 10.25 percent in both cases. *LEC Price Cap Order*, 5 FCC Rcd at 6787-88 (paras. 7-10).

[8] *LEC Price Cap Order*, 5 FCC Rcd at 6832 (para. 373).

[9] *LEC Price Cap Order*, 5 FCC Rcd at 6827-34 (paras. 332-84).

[10] *LEC Price Cap Order* at 6836 (paras. 403--04).

[11] For example, in the annual 1992 access tariff filing, Ameritech calculated a sharing obligation of $18.2 million and reduced its rates on July 1, 1992 to return that amount to ratepayers. Thus, Ameritech's revenues were about $9.1 million lower in 1992 that they would have been without sharing during the second half of the year. Ameritech reported its rate of

14. By reducing the range of earnings permitted under the backstop, however, add-back does reduce the efficiency incentives. Moreover, to the extent that the sharing and lower end adjustments under price caps are not refunds, it might be argued that the rate of return methodology used to define sharing obligations and lower formula adjustments should be based upon the returns achieved under the rates actually charged during the base year.

15. Based upon our review of this issue, we tentatively conclude that the add-back adjustment should continue to be part of the rate of return calculations of LECs subject to price caps, preceding their calculations for purposes of the backstop sharing and lower formula adjustments. We propose specific rule language in Appendix B to implement this tentative conclusion. We also request comments on this tentative conclusion and other mechanisms to deal with the issues we have discussed.

D. Credit for Below-Cap Rates

16. Use of add-back would present at least one further issue: whether a LEC that has set its rates below the price cap indexes during the base year should receive credit for the amount between its PCI and its API, or actual prices, in calculating its sharing amounts. In a sense, the LEC has already passed through some rate reductions by pricing below the cap. Allowing credit for below-cap rates would encourage carriers to charge lower, below-cap rates. Conversely, if the LEC's low earnings in one year are in part the result of its own decision to set rates below the cap, the rationale for allowing an upward adjustment in the cap the next year would seem to be less persuasive. Moreover, we established the alternative 4.3 percent productivity factor as an option for LECs who are willing to make larger up-front rate cuts in exchange for reduced sharing requirements. We did not specify other adjustments to sharing obligations, and declined to adopt a plan that would have automatically reduced sharing based upon the actual rates set by the LEC.[12] We request comment on whether LECs should be given credit for below-cap rates in the price cap backstop mechanism and how such a credit would be calculated.

III. PROCEDURAL MATTERS

17. *Regulatory Flexibility Act.* We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Local exchange carriers subject to price cap regulation, who would be affected by the proposed rule amendments, generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 6503(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

18. *Comment Dates:* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **August 2, 1993** and reply comments on or before **September 1, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you should file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 230, 1919 M Street, N.W., Washington, D.C. 20554.

19. *Ex Parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

For further information on this proceeding contact Dan Grosh, Tariff Division, (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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return for 1992 at 12.79 percent without add-back. An add-back adjustment of $9.1 million, along with the federal income tax effect, would raise Ameritech's rate of return to 12.99 percent. This 0.2 percent difference in rate of return would generate an additional $3 million in sharing obligation during the access year beginning on July 1, 1993.

Conversely, Contel of the South, which had a low end adjustment in 1992 of $3 million, reported a rate of return before add-back of 8.63 percent in 1992. With add-back, its adjusted 1992 rate of return would be 8.15 percent. Use of the adjusted rate of return in the low end adjustment would permit an additional $1 million in low end adjustment for Contel in the forthcoming access year.

12 *LEC Price Cap Order*, 5 FCC Rcd at 6803 (paras. 138-39).

APPENDIX A

- Consider the company whose earnings are as shown below, which makes its refunds through a refund check each December 31

	Year 1	Year 2	Year 3	Year 4
Revenues	2,425	2,425	2,425	2,425
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	14.25	14.25	14.25	14.25
Refund	100	100	100	100
ROR with Refund	13.25	13.25	13.25	13.25

- Contrast this with the effect on this same company with a sharing plan to implement the refunds, but without an add-back

	Year 1	Year 2	Year 3	Year 4
Revenues	2,425	2,325	2,375	2,350
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	14.25	13.25	13.75	13.50
Sharing to be returned in next year	100	50	75	62.50

  - This company shares less and reports a different rate of return each year, even though its underlying costs did not change

- Contrast this result with the effect of including the add-back

	Year 1	Year 2	Year 3	Year 4
Revenues	2,425	2,325	2,325	2,325
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	14.25	13.25	13.25	13.25
Add-back	0	100	100	100
ROR with Add-back	14.25	14.25	14.25	14.25
Sharing	100	100	100	100

- Thus the company which includes the add-back in its rate of return computation has the same rate of return and returns the same amount of money to ratepayers as the company which makes its refund by a check.

- Consider the company whose earnings are as shown below, which receives its low-end adjustment through a check each December 31

	Year 1	Year 2	Year 3	Year 4
Revenues	1,925	1,925	1,925	1,925
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	9.25	9.25	9.25	9.25
LowEnd Adj	100	100	100	100
ROR with Adj	10.25	10.25	10.25	10.25

- Contrast this with the effect on this same company with an exogenous adjustment to implement the low end adjustments, but without an add-back

	Year 1	Year 2	Year 3	Year 4
Revenues	1,925	2,025	1,925	2,025
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	9.25	10.25	9.25	10.25
Low End Adj to be regained in next year	100	0	100	0

  - This company receives less low end adjustment and reports a different rate of return each year, even though its underlying costs did not change

- Contrast this result with the effect of including the add-back

	Year 1	Year 2	Year 3	Year 4
Revenues	1,925	2,025	2,025	2,025
Expenses	1,000	1,000	1,000	1,000
Rate Base	10,000	10,000	10,000	10,000
ROR	9.25	10.25	10.25	10.25
Add-back	0	-100	-100	-100
ROR with Add-back	9.25	9.25	9.25	9.25
LowEnd Adj	100	100	100	100

- Thus the company which includes the add-back in its rate of return computation has the same rate of return and receives the same amount of money as the company which receives its low end adjustment in a check.

APPENDIX B

Proposed Rule Section

Part 61 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows: 1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3(e) is revised by adding the following bracketed language: Section 61.3 **Definitions**

(e) **Base Period.** The 12 month period ending six months prior to the effective date of annual price cap tariffs. [Base year or base period earnings shall not include amounts associated with exogenous adjustments to the PCI for the sharing or lower formula adjustment mechanisms.]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNIPLEX TELECOM TECHNOLOGIES, INC. File No. I-T-C-93-124

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Resell Services of Other Common Carriers to Provide Private Line Services and Switched Services between the United States and International Points.

ORDER AND CERTIFICATION

Adopted: June 18, 1993; Released: July 6, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned[1] application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services and resale of switched voice service for provision of switched services to the general public by Uniplex Telecom Technologies, Inc. (Uniplex).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-124 IS GRANTED and Uniplex is authorized to:

a. provide international switched services by the resale of the international switched voice services set forth in ATC's Tariff F.C.C. No. 2, AT&T's Tariffs F.C.C. Nos. 1, 2 and 13, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, Wiltel's Tariff F.C.C. No. 1 and Metromedia's Tariff F.C.C. No. 2 between the U.S. and overseas points listed in those tariffs; and

b. resell international private lines not interconnected to the public switched network for the provision of international private line services[2] between the United States and each of the nine international points,[3] as specified in Appendix A.

3. IT IS FURTHER ORDERED that Uniplex is authorized to lease and operate one-half interest in up to 21 56/64-Kbps equivalent circuits from authorized U.S. common carriers for the provision of its authorized resale of international private lines for private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that our authorization of applicant to provide private lines is limited to the provision of such private lines only between the U.S. and those point listed in the Appendix hereto -- that is, private lines which originate in the U.S. and terminate in one of the points listed in the Appendix, or which originate in one of the points listed in the Appendix and terminate in the U.S. In addition, applicant may not -- and applicant's tariff must state that applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

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[1] AT&T filed a Petition to Deny the application. Uniplex has withdrawn the request for private line service to Canada to be interconnected to the public switched network. AT&T no longer has any objection to grant of the application.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (Phase II Third Further Notice), 7 FCC Rcd 7927 (1992).)

[3] *See* Appendix A for list of authorized international points. We note that should Uniplex obtain any interest in facilities beyond the authorized international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for Uniplex to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

5. IT IS FURTHER ORDERED that neither Uniplex nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which Uniplex or any such persons or companies controlling or controlled by Uniplex are parties.

6. IT IS FURTHER ORDERED that:

(a) Uniplex shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. §203, and the *Interexchange Order*;[4]

(b) the services obtained by Uniplex shall be made generally available to similarly situated customers at the same terms, conditions and rates; and

(c) Uniplex shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that Uniplex shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that Uniplex shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual reports of circuit additions to certificated points, pursuant to Section 63.15 of our Rules, 47 C.F.R. §63.15, for private lines leased to provide resold private line service.

10. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

11. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services Uniplex seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

12. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country	No. of 56/64 Kbps Circuits
Argentina	2
Belgium	6
Brazil	2
France	2
Germany	2
Portugal	2
Spain	2
United Kingdom	2
Venezuela	1

[4] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991)(*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Sequoyah Communications, Inc.
Licensee, Station WQBB
Powell, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1993; Released: July 6, 1993

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 8 FCC Rcd 42 (1992), imposing a forfeiture of six thousand, two hundred and fifty dollars ($6,250) on Sequoyah Communications, Inc., for violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commissions Rules, and (2) a response to the NAL filed January 29, 1993, by Sequoyah.

2. Sequoyah's response concedes the broadcast of lottery advertisements prohibited by Section 73.1211, and focuses upon circumstances that, in Sequoyah's opinion, justify cancellation or reduction of the forfeiture imposed. Thus Sequoyah notes that it made a good faith effort to determine whether the advertisements were appropriate, consulting with local counsel before running them. It urges further that numerous other media outlets in its market were advertising the Kentucky lottery at the time its advertising spots were aired. Finally, Sequoyah cites its history of compliance with Commission rules and its status as a small, locally-owned AM daytimer as warranting a substantial forfeiture reduction.[1]

3. We agree that these considerations justify rescission of the forfeiture. As we noted in the NAL, neither reliance upon counsel nor confusion caused by the actions of other media can excuse violation of Commission rules. At the same time, however, they can serve as evidence that a licensee made every effort to assess its obligations, that its assessment was reasonable, if erroneous, and that it was made in good faith. Sequoyah's record of compliance with Commission rules is also entitled to consideration.

4. Accordingly, Sequoyah Communications, Inc.'s Response to Notice of Apparent Liability IS GRANTED to the extent set forth herein and, in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

[1] We reject as unfounded and unsubstantiated Sequoyah's assertion that our enforcement of Section 73.1211 violates its rights under the First Amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Oak Ridge FM, Inc
Licensee of Station WOKI-FM
Oak Ridge, Tennessee

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1993; Released: July 6, 1993

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 7 FCC Rcd 6350 (1992), imposing a forfeiture of six thousand, two hundred and fifty dollars ($6.250) on Oak Ridge FM, Inc., for violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. § 1304, and Section 73.1211 of the Commission's Rules, and (2) a response to the NAL filed November 13, 1992, by the licensee.

2. That Oak Ridge FM, as licensee of station WOKI-FM, broadcast advertisements for the Kentucky state lottery is, and has been, undisputed. At issue is the status of this lottery under our regulatory scheme. Under Section 73.1211(c)(1), lotteries conducted by a State acting under the authority of State law may be advertised on broadcast stations licensed to a location in that State or any other State that conducts such a lottery. Section 73.1211(c)(4)(i), in contrast, permits advertisement of other types of lotteries, so long as they are not otherwise prohibited by the State in which they are conducted and are conducted by a not-for-profit organization or a governmental organization. As the State of Tennessee does not conduct a State lottery, WOKI-FM could advertise lotteries conducted by not-for-profit or governmental organizations, but not State-conducted ones.

3. In response to the Commission's initial letter of inquiry, Oak Ridge FM submitted letters from the General Counsel of the Kentucky Lottery Corporation and from Washington counsel for the Corporation, both asserting that the Corporation was an independent municipal entity, in the words of the General Counsel a "quasi-governmental agency." Hence, Oak Ridge FM claimed that the lottery was not State-conducted and that Section 73.1211(c)(4)(i) was the governing provision.

4. Our NAL rejected this argument, concluding that the Kentucky Lottery was State-conducted within the meaning of Section 73.1211. We emphasized that Kentucky law referred to the venture as a State lottery and that it made the Lottery Corporation accountable to the governor, the general assembly, and the people of Kentucky through a system of audits, reports and thorough financial disclosures. Lotteries conducted by the Lottery Corporation were in essence conducted by the State under these circumstances, we concluded. We also found unpersuasive challenges to the constitutionality of our regulations, declining to expand the holding of *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633 E.D. Va. 1990), *aff'd*, 956 F.2d 263 (4th Cir. 1992), beyond its own unique circumstances.

5. Oak Ridge FM, in its response, mainly reiterates arguments already considered and disposed of. We are satisfied that our original classification of the Kentucky state lottery was a correct one. In one respect, through, the response raises an issue not fully addressed before, namely considerations justifying rescission of the forfeiture. By way of mitigation, Oak Ridge FM notes that it acted always in good faith, airing advertisements only after being advised by the General Counsel for the Kentucky Lottery Corporation that the Corporation was a quasi-government agency, and suspending them immediately upon hearing of the Commission's concern. The implication of this assertion, which we accept as valid, is that the licensee made every effort to assess its obligations, that this assessment was reasonable, if erroneous, and that it was made in good faith. Oak Ridge FM also cites in mitigation its history of compliance with Commission Rules.

6. We are persuaded that these circumstances justify rescission of the forfeiture. Accordingly, Oak Ridge FM's Response to Notice of Apparent Liability IS GRANTED to the extent set forth herein and, in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-6

In the Matter of:

Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes	RM-7736

ORDER EXTENDING WAIVER

Adopted: June 28, 1993; Released: July 6, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This order extends the existing waiver of Section 69.602 of the Commission's Rules[1] permitting the addition of two directors from outside the telephone industry to the Board of Directors of the National Exchange Carrier Association, Inc. (NECA). This waiver covers the period between January 1, 1994, and December 31, 1994. We are extending the waiver on our own motion.

II. BACKGROUND

2. Section 69.602 of the Commission's Rules specifies that NECA's Board shall consist of fifteen directors, of whom three are to be selected by and represent the Bell Operating Companies, three are to be selected by and represent other telephone companies having annual operating revenues in excess of $40 million, and nine are to be selected by and represent telephone companies having annual operating revenues of less than $40 million. These directors generally are elected for one-year terms that begin on the January 1 following their election.

3. In a November 9, 1990, letter to NECA,[2] the Commission determined that several NECA directors had apparently participated in an improper attempt to manage the earnings of NECA's common line pool for 1988. To provide a moderating effect on Board deliberations, the Commission stated its intention to consider expanding the NECA Board to include two or more members from outside the local exchange carrier (LEC) industry. In response to the Commission's *November 9 Letter*, NECA filed a petition for waiver and a petition for rulemaking to include two outside directors on NECA's Board of Directors. NECA's petition for waiver proposed the expansion on an interim basis, beginning January 1, 1992, and extending it until the Commission rules on NECA's petition for rulemaking[3] to make the Board expansion permanent.

4. On September 13, 1991, the Common Carrier Bureau granted NECA's petition for waiver to include two directors from outside the telephone industry on the 1992 NECA Board of Directors.[4] The Bureau later extended voting membership on all NECA committees to the two outside directors.[5] On April 21, 1992, NECA filed a petition to extend this waiver pending final resolution of the petition for rulemaking. That waiver was granted by the Bureau on July 7, 1992, for the January 1, 1993 - December 31, 1993 term only.[6]

5. The Commission released a Notice of Proposed Rulemaking (NPRM) in the above-captioned docket on February 11, 1993. Part of the NPRM considers whether the Commission should amend Section 69.602 of the Commission's Rules to permit two directors from outside the telephone industry to serve on NECA's Board.[7] The Commission received sixteen comment[8] and five reply comment[9] to the NPRM. All parties favored the permanent inclusion of outside directors on NECA's Board.

6. NECA must begin the process of selecting its 1994 Board of Directors in July, 1993. The Commission will not complete the rulemaking by that time. We believe that a one year extension of the current waiver is appropriate to allow NECA's elections to proceed without disruption.

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[1] 47 C.F.R. § 69.602.

[2] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, 5 FCC Rcd 7183 (1990) (*November 9 Letter*).

[3] *See* NECA Petition for Rulemaking, RM-7736, filed May 24, 1991.

[4] Expansion of the NECA Board to Include Two Directors from Outside the Telephone Industry, 6 FCC Rcd 5403 (1991) (*1991 Waiver Order*).

[5] National Exchange Carrier Association, Inc., Expansion of Voting Membership on Voluntary Access Tariff Committees, 7 FCC Rcd 2050 (1992).

[6] Expansion of NECA Board to Include Two Directors from Outside the Telephone Industry, 7 FCC Rcd 4401 (1992) (*1992 Waiver Order*).

[7] The NPRM also seeks comment on methods to improve the interstate access tariff and revenue distribution processes administered by the National Exchange Carrier Association, Inc. (NECA).

[8] The commenters to the NPRM are the ALLTEL Service Corporation (ALLTEL), Anchorage Telephone Utility (ATU), American Telephone and Telegraph Company (AT&T), Ameritech Operating Companies (Ameritech), Bell Atlantic telephone companies (Bell Atlantic), Cathey, Hutton & Associates, Inc., General Communication, Inc. (GCI), ICORE, Inc. (ICORE), National Association of Regulatory Utility Commissioners (NARUC), National Exchange Carrier Association (NECA), the National Telephone Cooperative Association (NTCA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), Southwestern Bell Telephone Company (SWBT), John Staurulakis, Inc. (JSI), United States Telephone Association (USTA), VTA Member Companies.

[9] ICORE, Inc. (ICORE), National Exchange Carrier Association (NECA), National Telephone Cooperative Association (NTCA), Southwestern Bell Telephone Company (SWBT), United States Telephone Association (USTA).

III. DISCUSSION

7. In granting the waivers for 1992 and 1993, we stated that a waiver of Section 69.602 would serve the public interest and that the addition of two directors from outside the telephone industry might provide increased assurance that NECA properly discharges its obligations under the Commission's Rules. There is evidence that the participation of two outside directors on the NECA board has been beneficial and that the two directors elected for the 1993 term have provided a valuable perspective and balance to the Board. We therefore authorize the additional directors for the January 1, 1994, through December 31, 1994, term.[10] In addition, we grant the two outside directors voting membership on all NECA committees for the 1994 term.

IV. ORDERING CLAUSE

8. Accordingly, pursuant to the authority contained in Sections 1, 4(i), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-05, 218-20, and 403, and Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(a) and 0.291, IT IS ORDERED that Section 69.602 IS HEREBY WAIVED to the extent stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[10] We anticipate that the Commision will address the issues raised in the NPRM in the near future. The action we are taking in this order is not intended in any way to prejudge the outcome of the rulemaking.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: June 29, 1993

Mr. Leonidas R. Moten 7230-D/1700C1
Route 86, Box 20-A
Jumping Branch, West Virginia 25969

Dear Mr. Moten:

This is in reply to your letter of April 19, 1993, requesting review of an April 13, 1993, decision by the Chief, Private Radio Bureau (Bureau), denying your complaint filed under Section 1.1870 of the Commission's Rules, 47 C.F.R. § 1.1870. Your complaint alleged unlawful discrimination, on the basis of handicap, in program or activities conducted by the Commission, in violation of Section 504 of the Rehabilitation Act of 1973, as amended.[1] You argued that even though you hold an Advanced Class amateur operator license and are accredited by W5YI-VEC as a volunteer examiner (VE), you were improperly excluded from serving as an administering VE by the Black Diamond Amateur Radio Club because of your blindness.

In its decision, the Bureau concluded that you were not improperly excluded from serving as an administering VE because you are unable to perform fully all of the necessary duties and responsibilities of a VE, and, as such, are not "otherwise qualified" to be a VE under Section 1.1803 of the Commission's Rules, 47 C.F.R. § 1.1803. The Bureau explained that "otherwise qualified" means that an individual with a handicap, such as a visual impairment, must meet the "eligibility requirements" and "achieve the purpose of the program or activity without modifications in the program or activity that the Commission can demonstrate would result in a fundamental alteration in its nature." 47 C.F.R. § 1.1803. Because Section 97.509(a) of the Commission's Rules, 47 C.F.R. § 97.509(a), requires each administering VE to be present and to observe the examinee throughout the entire examination, the Bureau determined that you are unable to meet these requirements. The Bureau further reasoned that waiver of the requirement in your case would defeat the purpose of the Commission's rule to ensure that at least three examiners are present to observe examinees and thereby preserve the integrity of the examination process.

On appeal, you maintain that you have not even been permitted to serve in the amateur operator license examination process in a capacity that does not involve actual testing, such as handing out Form 610 (amateur service license application), arranging tables and chairs, and directing examinees to testing rooms. With respect to performing functions other than actual examination administration, such as producing examination material in Braille or enhanced print, the Bureau in its decision referred to a letter of September 1, 1992, from the Black Diamond Amateur Radio Club to the West Virginia Human Rights Commission stating that on June 27, 1992, and prior thereto, you were given the opportunity to participate in the examination process by providing enhanced print of test files and advised that such an opportunity still exists. The Bureau also noted that you were advised of your eligibility to prepare examination questions for submission to the VEC Question Pool Committee. In addition, Mr. John Hymes of the Black Diamond Amateur Radio Club sent us a letter, dated May 17, 1993, stating that the Black Diamond Amateur Radio Club VE Team would find ways for you to assist the VEs at test sessions. If you wish to discuss this further, you may contact Mr. Hymes at (304) 252-4679, at any time prior to the next test session on July 24, 1993.

In addition, you restate that excluding you from serving as an administering VE constitutes a violation of the Americans with Disabilities Act of 1990 (ADA). As the Bureau indicated in its decision, the provisions of the ADA that pertain to telecommunications apply only to common carrier and broadcast licensees. Accordingly, we agree with the Bureau that the ADA is not applicable to your case.

Because you have not submitted any new facts on appeal, we are affirming the Bureau's denial of your discrimination complaint filed on October 23, 1992.

This letter was adopted by the Commission on June 25, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

[1] Section 119, Pub. L. 95-602, 92 Stat. 2982 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SUNSHINE TELEVISION, INC.
(Assignor)

and

SODA MOUNTAIN BROADCASTING, INC. (Assignee)
File No. BALCT-921201KF
File No. BALCT-921201KG

For Consent to the Assignment
of the Licenses of Stations
KDRV(TV), Medford, Oregon; and
KDKF(TV), Klamath Falls, Oregon

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1993; Released: May 27, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement; Commissioner Duggan issuing a statement.

1. The Commission has before it for consideration: (1) the above-captioned applications to assign the licenses of stations KDRV(TV) (ABC), Channel 12, Medford, Oregon, and commonly owned satellite KDKF(TV) (ABC), Channel 31, Klamath Falls, Oregon, from Sunshine Television, Inc. (Sunshine) to Soda Mountain Broadcasting, Inc. (Soda Mountain); and (2) a petition to deny the applications submitted by KMTR, Inc. (Petitioner), licensee of stations KMTR(TV) (NBC), Eugene, Oregon, KMTZ(TV) (NBC), Coos Bay, Oregon, and KMTX-TV (NBC), Roseburg, Oregon; and (3) other pleadings.

2. Soda Mountain proposes to continue the current operation of KDKF(TV), Klamath Falls, as a satellite of KDRV(TV), pursuant to the satellite exception set out in Note 5 of Section 73.3555.[1] In addition, Soda Mountain currently is the licensee of station KEZI(TV) (ABC), Channel 9, Eugene. Because the predicted Grade B contour of Medford station KDRV(TV) overlaps with that of station KEZI(TV), the applicant seeks a waiver of the Commission's duopoly rule[2] to allow common ownership of both stations. We shall address the satellite proposal first.

THE SATELLITE WAIVER REQUEST

3. *Background* Under our satellite policy, *see Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending), applicants seeking to transfer or assign satellite stations are required to demonstrate that the continued operation of the stations as satellites would serve the public interest. *See Midwest Communications, Inc.*, 7 FCC Rcd 159, 160-61 (1991). Such applicants are entitled to a presumption that the proposed satellite operation is in the public interest if they meet the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Television Satellite Stations* at 4213-14. The Commission will view favorably applications that qualify for the presumption and are unrebutted by an opposing party. *Id.* at 4214.[3] If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis and grant the application if there are other compelling circumstances that warrant approval. *Id.* For the reasons set forth below, we find that the continued operation of KDKF(TV) as a satellite station is consistent with our policy.

4. With respect to the first criterion needed to qualify for the presumption, the applicant's engineering study demonstrates that the City Grade contours of the Medford and Klamath Falls stations do not overlap. Thus, the satellite proposal meets the first component of the presumption.

5. With respect to the second criterion, applicants can demonstrate that the area is underserved using one of two tests. One of these is a "reception test" that would credit a proposed satellite station for serving an underserved area if 25% or more of the area within the proposed satellite's Grade B contour - but outside the parent's Grade B contour - receives four or fewer services, not including the proposed satellite's service.[4] Soda Mountain has submitted an engineering study showing that 46% of the relevant area is served by four or fewer services. Therefore, the applicant has met the second criterion for the satellite presumption.

6. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Although the applicant has not demonstrated that it meets the third criterion, it argues that compelling circumstances nevertheless justify a grant under the Commission's *ad hoc* approach. The applicant states that KDKF(TV) has operated as a satellite since its inception in 1989. Moreover, Soda Mountain alleges that the station would not likely survive as a full-service station. Specifically, Soda Mountain asserts that the station could not on its own receive a network affiliation, because ABC, NBC, and CBS place

[1] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the application now before us will not implicate the 12-station rule.

[2] 47 C.F.R. Section 73.3555(b).

[3] The Petitioner does not challenge the proposed satellite operation of KDKF(TV), instead limiting its objection to the requested duopoly waiver.

[4] Stations considered under the reception test include all educational, full-service television, television satellite, low power, and translator stations. *Id* at 4215.

signals over a significant portion of KDKF(TV)'s service area.[5] Furthermore, according to the applicant, KDKF(TV) would not likely be a viable independent station. In that regard, Soda Mountain cites a Commission staff study that concludes that particularly heavy financial losses in recent years have been concentrated among UHF independent and small market stations.[6] According to the applicant, KDKF(TV) would fall into both categories, because it not only is a UHF station, but it is also located in the Medford market, ranked by Arbitron as the 152nd largest Area of Dominant Influence (ADI).[7] Moreover, Soda Mountain states that unbuilt station KMVU(TV), Medford, is already licensed to serve the market, thereby increasing the difficulty of KDKF(TV)'s survival as a full-service station.

7. Soda Mountain adds that another indicator that KDKF(TV) would not likely survive as a full-service station is that all three stations licensed to Klamath Falls are satellites, thus reflecting the limited revenue base that exists in the market.[8] Thus, Soda Mountain argues that requiring full service operation by KDKF(TV) and imposing the substantial costs associated with such operation would seriously disadvantage KDKF(TV) in competing with the other Klamath Falls stations, thereby potentially diminishing diversity and competition in the area. The applicant argues that reaffirmance of the parent-satellite operation would preserve the existing level of diversity and competition.

8. *Discussion.* Based on the information before us, we believe that Soda Mountain has adequately demonstrated the need for continued satellite status. Soda Mountain has clearly satisfied the first two criteria of the satellite presumption. While the applicant has not demonstrated that it meets the third criterion, we find that it has made a strong enough showing to justify satellite operation under our *ad hoc* analysis. *See Midwest Communications, Inc.*, above. Each of the other two Klamath Falls television stations operates as a satellite, and the applicant has demonstrated the unlikelihood that KDKF(TV) would be able to compete effectively as a full-service station. Moreover, because the station has operated as a satellite since its inception in 1989, diversity and competition will not be diminished by grant of the satellite request. Accordingly, we find that continued satellite operation is justified, and we next address Soda Mountain's request for waiver of the duopoly rule.

THE DUOPOLY WAIVER REQUEST

9. *Background.* The predicted Grade B contours of stations KDRV(TV), Medford, and KEZI(TV), Eugene, the latter of which Soda Mountain already owns, overlap. Such an overlap of predicted Grade B contours of stations that would be commonly owned is generally proscribed by Section 73.3555(b) of the Commission's Rules. Accordingly, the applicant requests a waiver of the Rule. Soda Mountain states that the predicted Grade B overlap, as calculated by the standard prediction method, encompasses 9,999 square kilometers (representing 26.6% and 22.7% of the area within the Grade B contours of the Eugene and Medford stations, respectively) and 86,788 people (representing 11.3% and 19.4% of the populations within the Grade B contours of the Eugene and Medford stations, respectively).

10. However, Soda Mountain asserts that mountainous terrain separates Medford and Eugene, greatly diminishing the Grade B overlap. In support of its waiver request, Soda Mountain submits an engineering study utilizing other prediction methods that better account for the terrain roughness found in the area. That study calculates a terrain-adjusted Grade B contour overlap of approximately 793 square kilometers and 4,788 people. According to the applicant, the overlap area encompasses 2.1% and 1.8% of the area, and 0.62% and 1.15% of the population within the predicted Grade B contours of the Eugene and Medford stations, respectively.[9] Soda Mountain contends that the Commission has in the past authorized greater areas of Grade B overlap. However, the Petitioner submits an engineering study calculating a terrain-adjusted Grade B contour overlap of approximately 6,750 square kilometers, encompassing 17.7% and 15.3% of the area within the predicted Grade B contours of the Eugene and Medford stations, respectively. The Petitioner does not estimate what population is included within the overlap area.

11. Soda Mountain also alleges that numerous competing media services exist in the predicted Grade B overlap area. In that regard, the applicant asserts that 10 full-service commercial television stations, excluding KEZI(TV) and KDRV(TV), currently serve all or part of the predicted overlap area with Grade B or better service.[10] Soda Mountain states that the Commission has waived the duopoly rule in cases where fewer stations have served the overlap area, citing *Thomas J. Flatley*, 7 FCC Rcd 4242 (1992) (in which six television stations served the overlap area), and *Hubbard Broadcasting, Inc.*,

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[5] Stations KDRV(TV) (ABC) and KOBI-TV (NBC), Medford, rebroadcast their programming through Klamath Falls satellite stations KDKF(TV) (ABC) and KOTI-TV (NBC). In addition, the applicant states that KTVL-TV (CBS), Medford, has its programming carried over a network of 20 translators in the Medford-Klamath Falls market.

[6] F. Selzer and J. Levy, *Broadcast Television in a Multichannel Marketplace* (Office of Plans and Policy Working Paper No. 26, June, 1991), at 46.

[7] *1992 Television and Cable Factbook.*

[8] Klamath Falls stations KDKF(TV) and KOTI(TV) operate as satellites of Medford stations KDRV(TV) (ABC) and KOBI(TV) (NBC). In addition, Klamath Falls station KFTS(TV) (Ed.) rebroadcasts the programming of station KSYS(TV) (Ed.), Medford.

[9] The Petitioner argues that the Grade A contours of the stations will overlap. In its engineering study, the applicant calculates that the terrain-adjusted Grade A service overlap area encompasses an area of 35 square kilometers and 258 people, mostly on high mountain peaks. According to the applicant, the overlap is *de minimis*, consisting of 0.19% and 0.16% of the area, and 0.06% and 0.09% of the population within the predicted Grade A contours of the Eugene and Medford stations, respectively. However, because such a situation is not unusual in an area of very rugged mountains with isolated populations on their peaks, we find that the Grade A overlap is not significant.

[10] These stations, all licensed to communities in Oregon, include: KPIC(TV), Roseburg; KOAC-TV, Corvallis; KCBY-TV and KMTZ(TV), Coos Bay; KOBI(TV) and KTVL(TV), Medford; KVAL-TV, KEPB(TV), and KEVU(TV), Eugene; and KMTR(TV), Eugene-Springfield.

2 FCC Rcd 7374 (1987) (in which seven stations served the overlap area). The Petitioner asserts that a sum of ten stations is below the level considered to be competitive in other cases, citing *Capital Cities Communications, Inc.*, 59 RR 2d 451, 464 (1985) (in which 32 stations served the overlap area), and *Silver King Broadcasting of Vineland, Inc.*, 2 FCC Rcd 324 (1986), *recon. denied, Press Broadcasting Co.*, 3 FCC Rcd 6640 (1988), *aff'd sub nom., Office of Communications of the United Church of Christ v. F.C.C.*, 911 F.2d 803, 812 (D.C. Cir. 1990) (in which 25 stations served the overlap area). Further, the Petitioner distinguishes the case before us from those in which fewer than ten stations were in the overlap area. Specifically, the Petitioner argues that the waiver in *Flatley* restored a dark UHF station to service and encouraged the construction of a community's first local commercial television station, and that *Hubbard Broadcasting* involved a *de minimis* overlap.

12. Next, citing the *1992 Television and Cable Factbook*, Soda Mountain claims that five cable systems, each offering an average of 30 channels, serve 13,614 subscribers within the predicted overlap area. Moreover, the applicant asserts that six radio stations, one daily newspaper, and four weekly newspapers serve all or part of the overlap area. In addition, Soda Mountain states that each station will be separately managed.

13. Further, according to Soda Mountain, the two stations serve separate and distinct markets. The applicant asserts that Eugene and Medford are approximately 165 miles apart and are considered separate markets by Arbitron.[11] The applicant further claims that each market is highly competitive. With regard to the Eugene market, Soda Mountain states that five full-service stations are licensed to that community.[12] The applicant also asserts that four other stations in the Eugene market are satellites of Eugene stations.[13] In addition, Soda Mountain states that 31 cable systems, each offering an average of 25 channels, serve 122,000 subscribers in the Eugene ADI. With regard to the Medford market, Soda Mountain alleges that five television stations are licensed to that community[14] and that three television stations operate as satellites elsewhere in the market.[15] The applicant adds that 28 cable systems serve the Medford ADI, offering an average of 23 channels to over 78,000 subscribers.

14. The Petitioner, on the other hand, argues that Medford and Eugene are not distinct, competitive markets. It asserts that the transmission sites for KDRV(TV) and KOBI(TV), Medford, are on the boundary between the Medford and Eugene markets. The Petitioner further claims that KOBI(TV), Medford, serves the Eugene ADI and dominates the ratings for NBC programming in the southern counties of the Eugene ADI.[16] The Petitioner also alleges that there is significant contour overlap between each Eugene television station and all but one of the Medford television stations. In reply, the applicant argues that that assertion is based on predicted coverage and fails to take shielding by the mountainous terrain into account.

15. Soda Mountain next alleges that neither KEZI(TV) nor KDRV(TV) dominates its service area. With regard to the Eugene market, the applicant asserts that KEZI(TV) lacks the physical presence and ratings benefits throughout its coverage area that the CBS and NBC affiliates have due to their Roseburg and Coos Bay satellite stations, both of which are located within the Eugene market. With regard to the Medford market, Soda Mountain claims that KDRV(TV) and its Klamath Falls satellite are the newest stations in the ADI, having commenced service in 1984 and 1989, respectively. The applicant contrasts these stations with the Medford CBS and NBC affiliates, which have served the area for over 30 years. According to Soda Mountain, the CBS and NBC affiliates each have constructed over 30 translators to serve communities isolated by the terrain from the main transmitters. In contrast, however, Soda Mountain claims that KDRV(TV) transmits on only 14 translators, thereby missing a substantial number of people served by the other two network affiliates.

16. The Petitioner claims that competition in the Eugene market is diminished by the fact that the same interests control both KOBI(TV) (NBC), Medford (which allegedly also serves much of the Eugene ADI), and KPIC(TV) (CBS), Roseburg (which is within the Eugene ADI). According to the Petitioner, the licensee of the former station also has pending an application to acquire station K25AS (FOX), Eugene. The Petitioner claims that grant of the duopoly waiver will enable Soda Mountain to achieve concentration in the Medford and Eugene markets similar to that of KOBI(TV). According to the Petitioner, this would allow its commercial competitors to offer national and regional advertisers coverage in both markets, diminishing the Petitioner's ability to compete for advertising revenue. The Petitioner states that, because its Eugene, Coos Bay, and Roseburg stations are already losing money, grant of Soda Mountain's application would threaten the survival of KMTR(TV).

17. Next, Soda Mountain alleges that numerous public interest benefits will accrue from grant of its waiver request. First, the applicant states that the sharing of equipment and the common production of regional news stories will allow the stations to save money and expand their news coverage. Specifically, Soda Mountain alleges that common ownership with KEZI(TV) will allow the stations to inaugurate live remote news coverage, establish a microwave link to the state capital, and send reporters out of town to cover events of local interest. Second, the applicant alleges that KEZI(TV) and KDRV(TV) risk the loss of key employees and managers, but that having

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[11] According to the *1992 Television and Cable Factbook*, Arbitron lists Eugene and Medford as the 120th and 152nd ranked ADIs, respectively.

[12] The stations are KEZI(TV), Channel 9 (ABC); KVAL-TV, Channel 13 (CBS); KMTR(TV), Channel 16 (NBC); KEPB-TV, Channel 28 (Ed.); and KEVU(TV), Channel 34 (IND).

[13] Stations KPIC(TV), Roseburg, Oregon, and KCBY-TV, Coos Bay, Oregon, operate as satellites of station KVAL-TV (CBS), Eugene. In addition, stations KMTZ-TV, Coos Bay, and KMTX(TV), Roseburg, operate as satellites of Petitioner's station KMTR(TV) (NBC), Eugene.

[14] The stations are KDRV(TV), Channel 12 (ABC); KOBI(TV), Channel 5 (NBC); KSYS(TV), Channel 8 (Ed.); KTVL(TV), Channel 10 (CBS); and unbuilt station KMVU(TV) (IND).

[15] *See* n.8, above.

[16] The Petitioner cites the 1992 Nielsen County/Coverage Study for Douglas and Coos County. According to the Petitioner, the study states that KOBI(TV), Medford, has a 13 share in Coos County, while KMTR(TV), Eugene, has a 3 share.

similar employee resources will allow the stations better to meet a future personnel crisis or opportunity. Third, Soda Mountain contends that common ownership will allow it to avoid duplicating accounting and payroll costs. Finally, according to the applicant, common ownership will allow it to achieve cost savings in obtaining station supplies, allowing both stations to increase the quantity and quality of news, public affairs, and children's programming. It also maintains that each station will be able to cover issues of importance in smaller communities that are not now covered by television media.

18. The Petitioner states that the Commission has waived the duopoly rule in order to improve service to underserved areas, citing *Capital Cities*, above (in which Delaware and southern New Jersey residents achieved greater access to television service through an auxiliary studio and expanded news services). The Petitioner argues that *Capital Cities* is not applicable to the facts before us, because Soda Mountain's proposal will consolidate, rather than expand, station facilities and programming. The Petitioner also asserts that waivers have been granted to preserve a financially weak station, citing *Silver King*, above; to increase the financial viability of a station being rescued from bankruptcy, citing *Weigel Broadcasting Company*, 4 FCC Rcd 6200 (1989); and to return a dark station to the air, citing *Flatley*, above. In contrast to these cases, the Petitioner claims that both KEZI(TV) and KDRV(TV) are established, operating, network-affiliated VHF stations, and that the applicant has not demonstrated that either station is bankrupt or in extreme financial difficulty.

19. Soda Mountain responds that, while neither the Eugene nor the Medford station is failing, the Medford and Klamath Falls stations are not financially healthy. In that regard, the assignor Sunshine asserts that the stations have lost money every year since it acquired them.[17] In addition, the assignor claims that the stations cannot afford the equipment necessary to improve their news coverage. *See* ¶ 17, above. Moreover, Sunshine alleges that financial difficulties forced it to cancel the stations' morning news show after only six months. Finally, Sunshine asserts that it is selling the Medford and Klamath Falls stations for $4.1 million, approximately $4 million less than what the stations were acquired for in 1987. However, the Petitioner responds that most small market television stations are worth less than what they were in 1987.

20. *Discussion*. The ultimate objective of the duopoly rule, as well as the other multiple ownership rules, is to foster economic competition in broadcasting and to promote diversification of programming sources and viewpoints. *Multiple Ownership Rules*, 22 FCC 2d 306, 307 (1970), *recon. granted in part*, 28 FCC 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 FCC 1476, 1476 n.1, *recon. granted in part*, 3 RR 2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12; *John Hay Whitney*, 28 FCC 2d 736, 752 (1971).

21. Accordingly, the Commission has granted waivers of the duopoly rule where signal overlap is *de minimis*, *see, e.g., Hubbard Broadcasting*, above, or where the public interest to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *See, e.g., Capital Cities*, above (improved service to underserved area, service to separate and distinct markets, and availability of multiple signals in overlap area). As for the *de minimis* overlap standard, our past waiver cases have characterized this as an overlap area that represents less than one percent of both the area and the population of the Grade B contour of each station. *See, e.g., Hubbard Broadcasting* at 7374. With regard to the second standard, we have considered several factors, including the extent of the overlap, the number of media voices in the overlap area, the distinctiveness of the respective markets, the independence of the stations' operations with regard to programming and advertising, and the concentration of economic power that would result from common ownership. The Commission has also noted the benefits that can result from common ownership. Such benefits include greater public interest programming made possible economies of scale, *see First Report and Order* in MM Docket No. 87-7 (*Broadcast Multiple Ownership Rules*), 4 FCC Rcd 1723, n.46 (1989), the activation of a dark station, *see Flatley*, above, and the enhancement of a bankrupt station's financial viability, see *Weigel*, above.

22. Having reviewed the Petitioner's engineering exhibits regarding the extent of the Grade B overlap, we do not agree with its conclusions. Although the Petitioner has employed a valid field strength prediction model,[18] it appears that it may not have employed the model in a manner that would produce an accurate location of the Grade B contour. Because the terrain between the two stations consists of numerous isolated mountain peaks, reliance upon a modeling program alone could lead to significantly inaccurate results. For example, digitized terrain data that is processed by the Irregular Terrain Model (ITM) program requires interpolation that could cause apparent mislocation of receive sites and thereby result in erroneous estimates of reception in specific areas. Along pertinent radials,[19] the Petitioner has failed to determine where the terrain-limited Grade B contour extends from either station. Instead, it has relied on a "radial line" technique to identify areas where a signal in excess of Grade B level would be received from either station. In view of the terrain characteristics, we have found the Petitioner's reliance on the "radial line" technique as a means of calculating the extent of the Grade B overlap to be insufficient for its stated purpose. Hence, we have found it necessary to make an independent determination of the extent of the Grade B overlap.

23. In that regard, we have performed our own technical analysis, utilizing the National Telecommunications and Information Administration ITM version 1.2.2, in the

[17] The assignor's parent company acquired KDRV(TV) in 1987 and completed construction of KDKF(TV) in 1989.

[18] The Petitioner has employed the Irregular Terrain Model, version 1.2.1.

[19] For the purposes of this discussion, we define a pertinent radial as one taken in the direction of the portion of the predicted overlap area where there is considerable population.

point-to-point mode. Moreover, we have determined that within the area of predicted overlap, the majority of the population is located in a corridor a few kilometers wide, where there is much less rugged terrain.[20] We have examined in detail the predicted field strength levels of this area. Based upon our computations, we conclude that the Grade B overlap area encompasses approximately 200 square kilometers, encompassing 0.52% and 0.45% of the predicted Grade B contours of KEZI(TV) and KDRV(TV), respectively. The overlap area contains approximately the same number of people as calculated by the applicant, that is, 0.62% and 1.15% of the population within the predicted Grade B contours of the Eugene and Medford stations, respectively. While the overlap is not *de minimis*, it is not so large as to require a finding that the stations serve the same market. Moreover, this overlap is within the range of overlap that we have authorized in previous cases.[21] We also note that the Petitioner has not estimated the population within the Grade B overlap area, and that significant areas within the overlap area as calculated by the Petitioner are sparsely populated.

24. We find that the public interest benefits to be gained from a waiver of the duopoly rule would be greater than any detrimental effects resulting from the overlap. Eugene and Medford are separate and distinct markets, approximately 165 miles apart. *See Silver King*, above. In addition, each station will continue to be managed and programmed separately. Moreover, common ownership of the stations will allow KDRV(TV) to improve its news programming, to the benefit of the residents of both Medford and Klamath Falls. Furthermore, the availability of other broadcast signals in each market and in the predicted overlap area provides further assurance against undue concentration of economic control. In addition, based on the information before us, we are not persuaded that the viability of the Petitioner's stations in the Eugene market would be threatened by grant of the applications before us.

CONCLUSION

25. Having determined that the applicant is fully qualified and that grant of the applications will serve the public interest, IT IS ORDERED that the petition to deny submitted by KMTR, Inc. IS DENIED.

26. IT IS FURTHER ORDERED that the request of Soda Mountain Broadcasting, Inc. for operation of station KDKF(TV), Klamath Falls, Oregon, pursuant to the satellite exception to the duopoly rule, Section 73.3555(a)(3) of the Commission's Rules, IS GRANTED.

27. IT IS FURTHER ORDERED that the request for waiver of the duopoly rule, Section 73.3555(b) of the Commission's Rules, to permit common ownership of stations KEZI(TV), Eugene, Oregon, and KDRV(TV), Medford, Oregon, IS GRANTED.

28. IT IS FURTHER ORDERED that the applications to assign the licenses of stations KDRV(TV), Medford, Oregon, and KDKF(TV), Klamath Falls, Oregon, to Soda Mountain Broadcasting, Inc. ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

STATEMENT OF COMMISSIONER ANDREW C. BARRETT CONCURRING IN PART

In Re: Application of Sunshine Television, Inc. and Soda Mountain Broadcasting, Inc. for Assignment of the Licenses of Stations KDRV(TV), Medford, Oregon; an KDKF(TV), Klamath Falls, Oregon

For the third time since the Commission adopted its Notice of Proposed Rulemaking seeking comment on modifying the television multiple ownership rules,[1] I again am concerned that the Commission not change its multiple ownership rules through the waiver process. The facts of this case are not as egregious to promotion of the Commissions diversity goals as the two prior cases. Accordingly, I will concur in the grant of waiver of the television duopoly rule in this case.

Diversity of media ownership is a goal I have long supported. I continue to fully support this goal. At the same time, I recognize the need to examine whether, in light of marketplace conditions, the current rules still serve a valid purpose. To make an informed decision on this question the Commission initiated a rulemaking proceeding to examine the video marketplace. The Commission has received comment and reply comments in response to both our *Notice of Inquiry* and *Notice of Proposed Rulemaking* in that proceeding.[2] I am prepared to make modifications to our ownership rules, if the record in that proceeding supports such changes. However, the Commission has not reviewed that record. Nor, have we had an opportunity to draw any conclusions on the public interest benefits and detriments to changes in the television multiple ownership rules, including the television duopoly rule.[3] I continue to believe that the Commission should not be expanding the waiver standards to accomplish what we have not done through the rulemaking process.

In the previous duopoly case, I dissented based on my concern that the Commission not abandon our diversity of media ownership goals. I am only able to concur to the grant of a duopoly waiver in this case because of the fact

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[20] This corridor runs south-southwest from Eugene and is located between the Coast and Cascade mountain ranges.

[21] *See, e.g., Flatley*, above (in which the overlap area encompassed 1.13% and 0.27% of the population within the Grade B contours of the two stations).

[1] *See Pegasus Broadcasting*, 7 FCC Rcd 8625 (1992) ((Dissenting Statement of Commissioner Andrew C. Barrett); *ACT III Broadcasting*, 8 FCC Rcd 855 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett).

[2] *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991); *Notice of Proposed Rulemaking* in MM Docket No. 91-221, 7 FCC Rcd 411 (1992).

[3] 47 C.F.R. Section 73.3555.

that it is consistent with pre-*Pegasus* precedent. Although the overlap in this case does not meet the Commission's *de minimis* standard, it is far less than the overlap approved in either the *Pegasus* or *ACT III Broadcasting* cases. It is consistent with the overlap level approved in *Thomas J. Flatley*[4] which was decided before *Pegasus*. Moreover, it appears that other public interest considerations justify grant of the waiver in this case (*i.e.*, the number of media voices in the market, and the distinctness of the markets).[5] Accordingly, I will concur in the grant of the duopoly waiver. I will fully support the grant of a television satellite exception since it is consistent with prior grants.

STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re Applications of Sunshine Television, Inc. and Soda Mountain Broadcasting, Inc. For Consent to the Assignment of the Licenses of Stations KDRV(TV), Medford, Oregon; an KDKF(TV), Klamath Falls, Oregon

Because of my recent diffidence about waivers of our duopoly rule while a Commission rulemaking on television ownership is still pending, I am writing separately to explain why I do not oppose a grant in this case. In my judgment, this waiver is tantamount to the sort of *de minimis* waiver routinely granted by the Commission. Although the geographic size and population within the Grade B overlap area appear at first to be considerable--approximately 10,000 square kilometers and 87,000 people, respectively--the effect of terrain shielding is also significant, so much so that the overlap problem in reality is small. The Commission's own engineering study shows that mountainous terrain in the area reduces the geographic scope of the overlap area to less than 2 percent (200 square kilometers) and the affected population to about 1 percent (less than 5,000 people).

I am satisfied, therefore, that the Commission can grant this waiver without implicating our pending rulemaking and without offending the public interest.

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[4] *Thomas J. Flatley*, 7 FCC Rcd 4242 (1992).

[5] While I will vote in favor of the grant, I do have some trepidations about grant of a waiver in this case due to regional concentration of control issues. Hopefully, this issue will also be explored in our rulemaking proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Micronesian Telecommunications Corporation
Revisions to Tariff F.C.C. No. 1

Transmittal No. 82

ORDER

Adopted: June 18, 1993; **Released: June 22, 1993**

By the Associate Bureau Chief, Common Carrier Bureau:

1. On April 16, 1993, Micronesian Telecommunications Corporation (MTC), which provides foreign and interstate communications services to and from the Commonwealth of Northern Marianas Islands (CNMI), filed Transmittal No. 82 to temporarily reduce interexchange voice rates. These promotional reductions, scheduled to become effective June 24, 1993, were originally proposed to be effective for a 90 day period commencing April 30, 1993.[1]

2. IT&E Overseas, Inc. (IT&E) filed a petition to reject Transmittal 82 on April 28, 1993.[2] IT&E asserts that Transmittal 82 violates the Commission's rules requiring cost support and at least 35 days' notice for such filings by dominant carriers,[3] and so is patently illegal. IT&E contends that MTC is both the local exchange carrier and the dominant interexchange carrier serving CNMI, and that the rate reductions constitute pricing service on many routes below cost. IT&E avers that it provides the only currently active competition for MTC, and stands to be directly injured by drastic rate reductions just as it incurs new costs to gear up for additional traffic volume that it expects under equal access. IT&E Petition at 1-3. IT&E further contends that the only default status applicable to MTC is that of a dominant carrier, and argues that a previous authorization for MTC operating authority, which refers to MTC as a non-dominant carrier, does not necessarily characterize MTC's status correctly.[4] *Id.* at 6-7.

3. On May 5, 1993, MTC filed its reply. MTC states that its tariff offers primarily International Message Telephone Service (IMTS), as well as service between CNMI and other United States destinations, and asserts it was classified as a non-dominant carrier for IMTS under the *International Competitive Carrier Order*, 102 FCC 2d 812 (1985) and that determination has not since been revisited. MTC Reply at 2-3. MTC further states that the Commission has never questioned its practice of combining domestic service points in the same tariff, and notes that a 1987 facilities authorization treated MTC as non-dominant.[5] MTC Reply at 3-4.

4. The Common Carrier Bureau has reviewed MTC's Transmittal 82 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that no argument has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the motion for acceptance of a late-filed pleading, filed by IT&E Overseas, Inc., IS GRANTED.

6. IT IS FURTHER ORDERED that the petition for rejection filed by IT&E Overseas, Inc., against Micronesian Telecommunications Corporation Tariff F.C.C. No. 1, Transmittal No. 82, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

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[1] MTC filed on June 18, 1993, an application for special permission requesting permission to revise the tariff to reflect that the promotion will be in effect from the currently scheduled effective date to September 30, 1993, accompanied by cost support for the rate reductions. Application No. 31, (Waiver of §§ 61.58, 61.59), June 18, 1993. That application was granted June 21, 1993, and Special Permission No. 93-511 assigned. MTC filed Transmittal No. 90 on June 21, 1993.

[2] IT&E at the same time filed a motion for acceptance of its late-filed petition, claiming that the transmittal did not appear on the public tariff log or on a tariff database available to the general public, and did not receive a copy directly from GTE, MTC's parent, until April 27. This request was unopposed by MTC. Since IT&E has demonstrated good cause for the delay in filing its petition, we hereby grant its motion.

[3] IT&E states that Section 61.58(d)(3) of the Rules, 47 C.F.R. § 61.58(d)(3), establishes applicable notice requirements, and that Section 61.38, 47 C.F.R. § 61.38, requires cost support for filings by dominant carriers.

[4] *Citing* Micronesian Telecommunications Corporation, I-T-C-87-052, 2 FCC Rcd 1105 (1987).

[5] *See* note 3, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1632
Revisions to Tariff F.C.C. No 128

ORDER

Adopted: June 21, 1993; Released: June 22, 1993

By the Associate Bureau Chief, Common Carrier Bureau:

1. On June 9, 1993, Pacific Bell (Pacific) filed Transmittal No. 1632, which recalculated the Price Cap Index (PCI) for Pacific's traffic sensitive basket to reflect the requirements of the *800 Data Base Access Tariff Order*.[1] Specifically, Pacific has revised its exogenous treatment for certain overhead costs and reflected the application of a lower Percentage of Interstate Use (PIU) factor than was used in its original tariff filing to establish the service.[2] Also, the transmittal would increase Pacific's rate for basic 800 data base query service. This transmittal is scheduled to take effect on June 23, 1993.

2. The Bureau issued the *800 Data Base Access Tariff Order* on April 28, 1993, which, among other things, suspended the subject transmittals for one day, imposed accounting orders, and initiated investigations of the local exchange carriers' 800 data base query tariffs and the Bell Operating Companies' Service Management System/800 tariff. The captioned transmittal raises the same issues as those transmittals subject to the investigation initiated in the *800 Data Base Access Tariff Order*. Therefore, this transmittal will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1632, IS SUBJECT to the investigation instituted in CC Docket No. 93-129.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

5. IT IS FURTHER ORDERED THAT, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell SHALL FILE tariff revisions reflecting this suspension no later than June 22, 1993. For this purpose, we assign Special Permission No. 93-517.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Pacific Bell shall keep accurate account of all amounts received pursuant to its increased 800 data base query rate, which is one of the rate elements already subject to this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

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[1] *Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, 8 FCC Rcd 3242 (Com. Car. Bur. 1993) *(800 Data Base Access Tariff Order)*.

[2] *See* Pacific Bell's Tariff F.C.C. No. 128, Transmittal Nos. 1615 (filed March 1, 1993), 1621 (filed April 23, 1993) and 1622 (filed April 26, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Service Corporation AAD No. 93-54
Petition for Waiver of
§64.904 of the Commission's
Rules

ORDER

Adopted: June 21, 1993; Released: June 23, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On March 19, 1993, GTE Service Corporation (GTE) filed a request for waiver of the Commission's independent audit requirement[1] for the 1991 and 1992 reporting years for two of its operating companies, Contel of Indiana d/b/a GTE Indiana and Contel of the West d/b/a GTE West. In this order we deny GTE's request for waiver.

2. Section 64.903 of the Commission's rules requires carriers with annual revenue of $100 million or more to file cost allocation manuals (CAMs) describing the methods they use to separate the costs of regulated telecommunications services from the costs of nonregulated activities.[2] Section 64.904[3] requires that each carrier that files a CAM must engage an independent auditor on an annual basis to provide a positive opinion on whether the cost allocation results contained in the carrier's annual report (FCC Report 43-03, Joint Cost Report)[4] present fairly, in all material respects, the information in the carrier's CAM, the Commission's Joint Cost Orders[5] and the Commission's Joint Cost Rules. Those rules require that carriers file the Joint Cost Report and the independent auditor's report on April 1 of each year.[6]

II. THE PETITION

3. GTE states that through a merger in 1991 it acquired the Contel telephone operating companies, including Contel of Indiana and Contel of the West. GTE explains that Contel of Indiana and Contel of the West each reached the $100 million operating revenue threshold for the first time in 1991. However, GTE claims that until 1993 it was unaware that these companies were subject to the Joint Cost Report and the independent audit requirement. In March of this year, GTE requested and received an extension of the filing date for the 1991 and 1992 Joint Cost Reports of Contel of Indiana and Contel of the West until June 30, 1993.[7] GTE now requests that we waive the independent audit requirement for the same period.

4. GTE states that it is not feasible for it to engage an independent auditor to conduct an audit of Contel of Indiana and Contel of the West for the 1991 and 1992 reporting years. Normally an independent auditor is engaged several months before the end of the audited year. GTE claims that an audit at this time would present several problems. First, GTE claims that the independent auditor would be unable to perform certain testing that would normally occur during the audited year. Second, GTE states that statistical sampling procedures, used to verify such areas as time reporting and vouchers, would have to be modified to include Contel of Indiana and Contel of the West. According to GTE, it would be costly and difficult to readdress statistical sampling in order to include these two operating companies in the sampling process. Third, GTE contends that retrieval and analysis of data pertaining to these companies would be resource intensive since many of the Contel data processing systems used in 1991 have been shut down.

5. GTE explains that its request for waiver is of limited scope since it involves only two companies and encompasses only two reporting years. According to GTE, during the 1993 reporting year Contel of Indiana will be merged into GTE North, and as a result, Contel of Indiana will cease to exist as an entity. In addition, GTE states that during the 1993 reporting year, a portion of Contel of the West will be merged into GTE Northwest. GTE explains that after this merger, Contel of the West will fall below the $100 million reporting threshold. Therefore, GTE states, neither Contel of the West nor Contel of Indiana will be subject to the independent audit requirement in 1993.

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[1] *See* 47 C.F.R. §64.904.

[2] The CAMs must describe each of the carriers' nonregulated activities and provide information on their affiliated transactions, employee time reporting procedures, and cost apportionment methods.

[3] This requirement was established in Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298, 1330-1331 (*Joint Cost Order) recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order), further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order), aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990). On February 5, 1992, this requirement was codified as 47 C.F.R. §64.904.

[4] The Joint Cost Report provides annual data which shows the results of the carriers' regulated and nonregulated cost allocations for those Part 32 accounts which are related to the carriers' revenue requirement.

[5] *See*, note 3, *infra*.

[6] *See* 47 C.F.R. §§43.21 and 64.904.

[7] GTE received a 90-day extension of the April 1, 1993, filing date for the Joint Cost Report and several other reports, known collectively as ARMIS reporting requirements. See Letter of Kenneth P. Moran, Chief, Accounting and Audits Division to Carol Bjelland, Director, Regulatory Matters, GTE Service Corporation, March 26, 1993.

III. DISCUSSION

6. The independent audit is one component of the Commission's accounting and cost allocation safeguards designed to prevent cross-subsidization by telephone companies offering nonregulated services. The independent audit is used to monitor the results of the carriers' cost allocation procedures set forth in their CAMs and to assist Commission staff in evaluating the carriers' compliance with the Commission's cost allocation rules. Since the Commission does not have the auditing resources to perform the type of detailed analysis performed by the independent auditors, these audits are a necessary and indispensable part of its monitoring program. The individual components of the Commission's accounting and cost allocation safeguards are designed to work on an integral basis to produce an effective deterrent to cross-subsidization. The absence of any component of these safeguards would diminish the effectiveness of the Commission's monitoring efforts.

7. Our rules call for each carrier with annual revenues in excess of $100 million to have an independent audit of its regulated/nonregulated cost allocations performed annually. We interpret this to mean that the initial audit is required beginning the year *after* the carrier first crosses the $100 million threshold. If a carrier has never exceeded the threshold before, it is unlikely that it would be certain that it was going to exceed the threshold until late in the year. To require the carrier to file a CAM, obtain CAM approval, and engage an auditor late in the year to audit the carrier's results for the entire year would be unduly burdensome and probably unrealistic. Under this interpretation, for 1991, the first year these carriers exceeded the threshold, GTE was not required to have independent audits performed.

8. Nonetheless, GTE is required by Section 64.904 to engage an independent auditor for Contel of Indiana and Contel of the West for 1992. Moreover, GTE does not demonstrate any special circumstances that warrant a waiver of the Commission's independent audit requirement for 1992, nor does it demonstrate that the public interest will be served by a grant of its waiver request.[8] GTE claims that it was unaware that the independent audit requirement applied to these companies and that they were not included in its annual independent audit. This oversight, however, and the complications that have arisen as a result of it do not excuse GTE from compliance with the Commission's rules.

9. GTE's argument that certain testing cannot be done because data will be difficult to obtain is not sufficient grounds for the grant of a waiver. We agree that GTE's independent auditors may not be able to perform each step of the independent audit process in the same way they would have performed it if the audit were performed during the year being audited. However, we believe that an audit can be performed sufficiently to permit the expression of an opinion by the auditors. If necessary, GTE may seek guidance from Bureau staff in addressing problems it may encounter during the 1992 audit. If the independent auditor finds that sufficient data are not available, the auditor will need to issue a qualified opinion or an opinion appropriate to the circumstances and to state the reasons in his audit report.

10. Our rules require subject carriers to submit a copy of the independent audit report with their annual FCC 43-03 Joint Cost Report by April 1 of the following year. On March 26, 1993, we granted Contel of Indiana and Contel of the West extensions of the filing date for their 1992 Joint Cost Reports until June 30, 1993. It is clear that these carriers will not be in a position to comply with our audit requirements by June 30, 1993. Although we still require them to file the Joint Cost Reports by June 30, 1993, we will give them another 120 days to file the independent audit reports.

11. Finally, we take this opportunity to clarify the Commission's CAM filing requirements for those carriers who have not yet reached the $100 million threshold. In the *Joint Cost Order*, the Commission found the CAM filing requirement and the independent audit requirement too burdensome for small local exchange carriers. However, the *Joint Cost Order* does require all local exchange carriers to adhere to the Commission's cost allocation rules.[9] Therefore, although a carrier may not have a CAM on file with the Commission, it should have procedures which ensure that the Commission's cost allocation rules are being implemented. To ensure compliance with our rules, a carrier should submit its CAM to this Commission for approval within 90 days after it reaches the $100 million operating revenue threshold. If the carrier is part of a holding company group that has a CAM on file with the Commission, in the first quarterly CAM filing after the carrier reaches the $100 million threshold, the CAM must be revised to include the newly subject carrier.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, That GTE Service Corporation engage an independent auditor to perform an audit for 1992 as required by 47 C.F.R. §64.904 of the Commission's rules for Contel of Indiana d/b/a GTE Indiana and Contel of the West d/b/a GTE West.

13. IT IS FURTHER ORDERED, That GTE Service Corporation submit, on or before November 1, 1993, the independent auditor's opinion on the 1992 FCC 43-03 Joint Cost Reports of Contel of Indiana d/b/a GTE Indiana and Contel of the West d/b/a GTE West.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[8] *See* Northeast Cellular Telephone Company, L. P. v. FCC, 897 F. 2d 1164 (D.C. Cir. 1990).
[9] *Joint Cost Order*, 2 FCC Rcd at 1304-1305.

Before the
Federa l Communications Commission
Washington, D.C. 20554

CC Docket No. 88-287

In the Matter of

GTE Service Corporation — Transmittal No. 7
Use of Alternate Technologies
for Equal Access

ORDER

Adopted: June 21, 1993; Released: June 23, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a petition filed December 18, 1992, GTE Service Corporation (GTE), on behalf of its affiliated GTE domestic telephone operating companies, filed a request for waiver of the *Alternate Technologies Order* to enable it to continue charging premium access rates at 36 of its smaller end offices.[1] These 36 end offices are located in Iowa and Indiana and GTE continues to employ alternate equal access technology at these offices.[2] On December 31, 1992, the Bureau released an order soliciting comments on the GTE petition;[3] none were filed. For the reasons discussed below, the Common Carrier Bureau (Bureau) grants GTE a limited waiver to allow GTE to continue charging its current rates for access to these 36 end offices until December 31, 1994.

II. BACKGROUND

2. Following an investigation of the use of alternate technologies by a number of LECs, the Commission released the *Alternate Technologies Order*. In that order, it found that earlier use of alternate technologies by GTE to provide equal access was not an unjust or unreasonable practice. However, the Commission also found that use of such technologies to provide centralized equal access from tandems in Iowa and Indiana would not be reasonable on a permanent basis. Thus, the Commission directed GTE's predecessor, Contel Service Corporation (Contel), to install electronic switches at these end offices by December 31, 1992, or to charge "something less than premium rates" after that date if access to those offices was still provided through alternate technologies.[4]

3. However, the Commission also recognized that in certain limited situations conditions may exist that make conversions to full equal access technology impractical or infeasible. Accordingly, the Commission provided GTE and the Bell Operating Companies (BOCs) with an opportunity to petition for waiver of the requirement that access be provided at "something less than premium rates."[5] While the Commission did not specify all exceptions that might apply, it did note, for example, that deployment of electronic switches in some offices may not be feasible because of the extremely small size of those offices.[6] In a December 1992 order, for example, the Bureau granted such a waiver in response to a petition filed by US West Communications, Inc.[7]

III. GTE PETITION

4. On July 1, 1992, GTE notified the Commission by letter that 36 of its end offices located in Iowa and Indiana would continue to offer equal access using alternate technologies after December 31, 1992. On December 18, 1992, GTE filed the above petition seeking Commission authority to continue charging premium rates for access to each of these end offices. GTE Petition at 2. In support of its petition, GTE notes that the number of lines served by these offices is small and that each is now scheduled for conversion to full equal access during the period 1993 through 2001. GTE also notes that the Commission has not yet initiated any proceedings to determine appropriate non-premium charges for these offices and argues that the public interest would not be served by initiating such proceedings at this time. In GTE's view, such proceedings would require expenditure of both GTE and Commission resources which could be better used on other matters. GTE also contends that the rate changes prior to full equal access conversion would cause administrative burdens and additional costs. *Id.* at 3.

5. GTE contends it is "fully committed" to converting the 36 remaining alternate technology end offices to full equal access. GTE notes that during 1992 it converted five exchanges (14,817 lines) from alternate technology to full equal access and that these five upgrades covered one-

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[1] "Alternate equal access" or "adjunct" technologies refer to that class of hardware or software additions or modifications which are made to step-by-step or electromechanical end offices (and similar access tandems) in lieu of installing more modern electronic switches at each end office. The use of such alternate technologies to provide Feature Group D (FGD) service permits local exchange carriers (LECs) to offer such service from certain older end office switches, subject to restrictions on the availability of certain features commonly provided by more modern electronic end offices. *See* Southwestern Bell Telephone Company, MM [sic] Docket No. 88-287, 6 FCC Rcd 3760 (1991) (*Alternate Technologies Order*).

[2] *Id.* at 3760 n.1.

[3] GTE Service Corporation Use of Alternate Technologies for Equal Access, CC Docket No. 88-287, DA 92-1753 (Com. Car. Bur., released Dec. 31, 1992).

[4] *Alternate Technologies Order*, 6 FCC Rcd at 3779 (para. 192).

[5] While the language of paragraph 202 of the *Alternate Technologies Order* might appear to limit the availability of such petitions to the BOCs, in paragraph 204, the Commission declared that Contel, GTE's predecessor, should be subject to the same requirements as the BOCs. In light of this declaration and the general right of parties to file waiver petitions under Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, we do not read the order to limit the availability of such petitions to the BOCs.

[6] *Alternate Technologies Order*, 6 FCC Rcd at 3780 (para. 202).

[7] US West Communications, Petition for Authority to Continue to Charge Premium Rates for Access Service After 1992, CC Docket No. 88-287, 8 FCC Rcd 190 (Com. Car. Bur. 1992).

third of the access lines using alternate technology at the beginning of 1992. While GTE acknowledges that its conversion schedule for these offices extends through 2001, GTE explains that most of these end offices are very small, noting that none of the offices scheduled to be converted after 1993 has more than 2000 access lines. GTE explains that its conversion schedule was based upon many engineering and business considerations. GTE further contends that it does not believe that it is economically feasible to convert these offices to full equal access sooner than planned because of the capital costs involved. *Id.* at 3.

6. Of GTE's 36 remaining alternate technology end offices, 26 are located in Iowa. GTE plans to convert eight of these end offices (serving 11,408 lines) to full equal access by the end of 1993 and to convert eight more (serving 4,475 lines) during 1994. With regard to the 10 remaining end offices in Iowa, GTE advises that it has, after discussions with the Iowa Utilities Board, a comprehensive plan for the modernization of these remaining offices but that the anticipated capital expenditure of $2,892,000 needed to convert these 10 offices is not justified prior to the 1995-1997 period planned for such modernization. GTE notes that after 1994, the remaining 10 alternate technology exchanges in Iowa will account for only 3,484 access lines or an average of 348 lines per exchange. *Id.* at 3. According to GTE's schedule, all Iowa end offices would be converted by the end of 1997. *GTE Petition*, Attachment A, p.1.

7. Of GTE's 36 remaining alternate technology end offices, 10 are located in Indiana. While GTE declares its intention to convert these 10 end offices during the period 1995-2001, GTE acknowledges that it is still in the process of "finalizing" the conversion schedule for Indiana. GTE explains that this schedule "provides the most efficient use of GTE's resources." GTE also asserts that, in light of the "capable... easily maintained" crossbar equipment currently in use in most of these end offices and the approximately $5 million cost involved, it cannot justify earlier conversion of these offices. GTE adds that rearranging its capital investment schedules to advance Indiana office equal access conversions would delay the upgrade of other offices scheduled for upgrade -- including offices that do not currently offer virtual equal access through alternate technologies. *Id.* at 4.

8. GTE notes that, compared to the earlier services offered at these 36 end offices, end users and interexchange carriers have benefited and will continue to benefit from GTE's continued use of alternate technology. While GTE acknowledges that customers may experience "a few inconveniences" with its alternate technology, GTE claims the Commission has recognized there are many benefits obtained from such "short-term use" of alternate technologies. *Id.*

IV. DISCUSSION

9. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that waiver petitions may be granted if "good cause therefor is shown." Upon review of GTE's petition, we conclude that GTE has shown good cause for a limited waiver of the Commission's requirement that "something less than premium rates" be charged for access to end offices that continue to utilize alternate technologies to provide equal access after December 31, 1992. As the courts have pointed out, general rules can be waived where particular facts would make strict compliance inconsistent with the public interest.[8] Thus, the Commission in the *Alternate Technologies Order* stated that carriers could obtain a waiver of the requirements of that order.[9]

10. Here, GTE represents that during 1992 it upgraded five alternate technology end offices serving 14,817 lines -- about one third of the access lines needing such upgrade as of the beginning of that year. GTE further represents that during 1993 and 1994 it will upgrade an additional 16 of these end offices serving a total of 15,883 lines. As a result, by the end of 1994, GTE will have upgraded almost 70 percent of the access lines that needed such upgrade as of the beginning of 1992. GTE Petition at 3. On the whole, GTE's schedule for those first 16 alternate technology end offices in Iowa appears to be a reasonable means of achieving conversion of these end offices within a reasonable period. On the basis of the size and location of each of these 16 end offices, the progress GTE is making toward their conversion, together with the representations by GTE and other information in the record, we find good cause to allow GTE to continue charging premium rates for access to these 16 Iowa end offices through December 1994. In the event an earlier conversion date for a particular end office has been specified in GTE's petition, we only allow GTE to continue charging premium rates for access to that office through the earlier date.[10]

11. However, on the basis of the record before us, we are not able to distinguish the situations at the remaining 20 alternate technology offices in Iowa and Indiana from those at the first 16 such end offices in Iowa which GTE plans to convert by the end of 1994. Accordingly, we are not satisfied that GTE has met the Commission's waiver standard for these remaining 20 end offices. For one thing, we are not persuaded by GTE's claim that it is unable to convert *any* of the remaining 20 end offices in Iowa and Indiana before 1995 because of the estimated costs of converting all those end offices after 1994. If the remaining end offices in each state can only be converted as a group, GTE fails to explain the reasons for such mandatory grouping. If these end offices can be converted on an individual basis, GTE fails to provide the estimated cost of such individual conversions and to make an adequate showing why it is clearly uneconomical or otherwise infeasible to convert some number of these 20 offices

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[8] *See* WAIT Radio v. FCC, 418 F.2d. 1153, 1159 (D.C. Cir. 1969); *See also* 47 C.F.R. § 1.3.

[9] As noted previously, to obtain a waiver of the general rule set forth in the *Alternate Technologies Order*, a carrier must show that conversion to full equal access would "clearly be uneconomical." This standard, however, appears to apply only where the carrier declines to convert to equal access altogether, rather than where, as here, the carrier commits to convert but merely proposes to delay conversion for a relatively short period of time. Thus, we believe the general waiver standard set forth in *W AIT Radio, supra*, best applies in the instant circumstance.

[10] GTE has scheduled three Iowa end offices (Peoria, Otley and Plano) for conversion by October 1993 and five Iowa end offices (Mt. Pleasant, Ainsworth, Crawfordsville, Pella, and Leighton) for conversion by the end of 1993. GTE Petition, Attachment A, p. 1. Initially omitted inadvertently from its petition, GTE filed Attachment A with the Commission on June 8, 1993.

before 1995. For example, GTE contends that rearrangement of its schedule to accommodate earlier conversion of the 10 Indiana end offices may delay the upgrade of other Indiana offices that do not even have alternate technology, but GTE provides no details to support these contentions.

12. Accordingly, the Bureau will only allow GTE to continue to charge premium rates for these remaining 20 end offices through 1994. If GTE is able to make a convincing, particularized showing that installation of electronic switches in any of these remaining 20 end offices would not be feasible by December 31, 1994, we will revisit the matter once such a showing has been made. However, we direct that any such GTE request be filed on or before June 30, 1994, to allow adequate time for Bureau consideration. Also, in the event the Commission declines to grant such a petition, GTE is directed to include with any such request GTE's proposed rates (and supporting data) for access to these end offices set at "something less than premium rates."

13. In light of GTE's progress and commitments to date, we believe that a decision to grant GTE a limited waiver for all 36 end offices through 1994 will not undermine the equal access conversion process. Therefore, good cause exists to make this limited waiver of the requirements of the *Alternate Technologies Order* for GTE through 1994; however, for each end office that GTE has specified an earlier conversion date in its petition, we only allow GTE to continue charging premium rates for access to that end office through that earlier date.[11] Accordingly, we grant in part and deny in part GTE's waiver petition.

V. ORDERING CLAUSE

14. Accordingly, pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, IT IS ORDERED that the petition for authority to continue to charge premium rates after 1992 for access service to certain end offices filed by GTE Service Corporation, on behalf of its affiliated domestic telephone operating companies, IS GRANTED, to the extent that GTE Service Corporation is hereby authorized to continue charging its current rates for access service at these offices through but not after December 31, 1994; except that, at each office for which an earlier date is specified above, this authorization will expire on such earlier date. To this extent, the above petition IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[11] Where GTE indicates in its petition that conversion of a particular end office will occur within a given month or year, we understand that the conversion will be completed on or before the last day of the period indicated. *See* GTE Petition, Attachment A.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 — Transmittal No. 2275

ORDER

Adopted: June 22, 1993; Released: June 23, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On May 10, 1993, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2275 to establish "Frame Relay Service" (FRS). This service is designed to support high speed packetized data transmission between private data networks such as local area networks, metropolitan area networks and wide area networks. FRS is a separate network that does not interconnect with or otherwise utilize the public switched voice network. Fast packet technology enables the separate FRS network to transport data at a faster rate than existing packet switched services. SWBT states that many interexchange carriers (IXCs) now offer frame relay services for users desiring to connect private data networks across local access transport area (LATA) boundaries. SWBT's FRS is being proposed in response to customer requests for an economical alternative to dedicated private line services for the local access to these IXC frame relay networks. SWBT Description and Justification (D&J) at 1-2 - 1-4. MCI Telecommunications Corp. (MCI) filed a petition to suspend and investigate SWBT's transmittal, and SWBT filed a reply. SWBT's Transmittal 2275 is scheduled to take effect on June 24, 1993.

2. MCI asserts that SWBT's proposed frame relay service represents an unjust and unreasonably discriminatory practice by virtue of the proposed interface in violation of Sections 201(b) and 202(a), 47 U.S.C. § 201(b) and 202(a). MCI observes that SWBT Technical Publication TP 76642, which is referenced in Transmittal 2275, states that SWBT's proposed frame relay service is based upon a user-to-network interface (UNI), and not a network-to-network interface (NNI).[1] Consequently, MCI asserts, the primary IXC interconnection with SWBT's frame relay network is through the use of "dumb" private lines. According to MCI, SWBT's tariff will be of no use to IXCs because the proposed service is based upon an interface that does not provide the many network management capabilities that would be available through NNI. MCI Petition at 1-2.

3. MCI further argues that the same technical publication indicates that SWBT will offer an NNI-based frame relay service pending development of technical standards by the appropriate standards body. MCI avers that it has been advised by BellCore that NNI technical standards have been approved, and it therefore believes that SWBT should be required to offer frame relay service via NNI instead of UNI. MCI Petition at 2-3. MCI claims that the proposed UNI-based frame relay service could have significant anti-competitive impacts. MCI argues that Transmittal 2275 would provide SWBT with an undue and unreasonable advantage in violation of § 201(a) and 202(b) of the Act, and is premature as an interexchange access tariff. MCI Petition at 3.

4. SWBT replies that its choice of a user-to-network interface is appropriate and does not warrant suspension and investigation. SWBT first observes that the Common Carrier Bureau has already considered similar arguments by MCI against a frame relay service tariff proposed by US West in its October 9, 1992 Order that allowed US West's FRS tariff to take effect. US West Communications, Inc. Revisions to Tariff F.C.C. No. 1, Frame Relay Service, Transmittal Nos. 282 and 294, *Order*, 7 FCC Rcd 6769 (Com. Car. Bur. 1992). SWBT argues accordingly that MCI's claims should be rejected here as well. SWBT Reply at 2.

5. SWBT disputes MCI's factual claims that IXC frame relay networks will not be able to interconnect with SWBT's frame relay network as it is currently designed and IXC interconnection is only possible through the use of private lines. SWBT states that it has demonstrated the use of the UNI to connect frame relay networks in internal laboratory tests and technical trials and that it has been found to be an acceptable interconnection arrangement in these tests.[2] SWBT also disputes MCI's interpretation of the language in SWBT's Technical Publication 76642, which states that SWBT will implement an NNI-based FRS in the future. Technical standards are just one of the hurdles which must be overcome before such a service can be offered, SWBT states. In addition, support for those technical standards must be secured from SWBT's network equipment vendor. Further, SWBT asserts that both the American National Standards Institute (ANSI) and the Consultative Committee for International Telephone and Telegraph (CCITT) have yet to publish a NNI standard for frame relay, and only after such publication can SWBT's network equipment vendor complete switch development to support the NNI standard. At that time, SWBT states it will offer an NNI-based frame relay service. SWBT Reply at 2-3.

6. Finally, SWBT responds that Transmittal 2275 does not allow it to engage in the provision of interexchange service. MCI's claim, SWBT states, is based upon MCI's erroneous belief that SWBT's FRS cannot be used by IXCs, implying that end-users will be left with no choice but to utilize some SWBT-dictated method of interexchange interconnection. Since interconnection to IXC frame relay networks is possible through the UNI interface, and since customers can also buy private lines from IXCs for interconnection purposes, SWBT maintains

[1] Southwestern Bell Telephone Company Technical Publication, TP 76642, Issue 2, page 8, (January, 1993).

[2] SWBT also states that in January 7, 1993 correspondence it informed MCI that SWBT is willing to conduct similar interoperability tests with IXC frame relay networks upon request, but that to date, MCI has not requested such a test. SWBT Reply at 2-3.

that it is not forcing customers to use SWBT for interLATA service, and therefore SWBT is in no way legitimizing any provision of its own interLATA service through Transmittal 2275. SWBT notes that it is prohibited from providing interLATA services by the Modification of Final Judgment (MFJ), and argues that nothing in Transmittal 2275 is intended to allow SWBT to violate the MFJ. SWBT Reply at 4-5.

7. The Common Carrier Bureau has reviewed SWBT's transmittal, MCI's petition, and SWBT's reply. We conclude that no compelling argument has been presented that the tariff requires suspension, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petition for suspension and investigation filed by MCI Telecommunications Corp. against Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2275, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc.
GTE Service Corporation
Lincoln Telephone and Telegraph Co.
NYNEX Telephone Companies
Pacific Bell
Rochester Telephone Corporation

Zone Density Pricing Plans

ORDER

Adopted: June 18, 1993; Released: June 18, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-captioned six local exchange carriers (LECs) filed zone density pricing plans[1] to implement the pricing flexibility granted them in the *Expanded Interconnection Order*.[2] We have completed our review of the zone density pricing plans filed by these six LECs. As discussed further below, we find that the six plans, as supplemented, reasonably implement the density pricing authorized by the Commission in the *Expanded Interconnection Order*. By this Order, we approve the zone density pricing plans filed by these six LECs. They may now file tariff revisions, to be effective on not less than 31 days' notice, to implement their zone density pricing plans.

II. BACKGROUND

A. Commission Requirements

2. In the *Expanded Interconnection Order*, the Commission adopted rules that reduced the regulatory and economic barriers to competitive entry in the interstate special access market. The Commission required all Tier 1 LECs, except those companies which remain in the National Exchange Carrier Association pool, to file expanded interconnection tariffs permitting third parties to interconnect with the LEC access network for the provision of interstate special access services. In that Order, the Commission also granted those LECs additional pricing flexibility in order to bring their special access rates more in line with their costs. The Commission believed that the combination of special access expanded interconnection and increased pricing flexibility for LEC special access services would establish an equitable regulatory framework for promoting competition in the interstate special access market.[3]

3. To implement this additional pricing flexibility, the Commission permitted each LEC to establish, subject to Commission approval, zones within each study area[4] and required each central office to be assigned to one of the zones. Once the plans were approved, the LECs could file tariffs on 31 days' notice establishing different rates in each zone. Such tariffs may not take effect before special access expanded interconnection arrangements are operational within the study area for which the revised tariff rates are to apply.[5]

4. The Commission required the LECs to make a showing in their zone density plan filing that the assignment of each central office to a zone "reflects cost-related characteristics, such as traffic density or some measure of traffic through each office"[6] and accounts for both special access capacity and switched traffic. Finally, the Commission provided that geographic contiguity could be considered when assigning offices to particular zones in order to reflect exchange area boundaries or communities of interest between the areas served by the end offices, but should be a less important factor than traffic density.

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[1] BellSouth Telecommunications, Inc. (BellSouth), Lincoln Telephone and Telegraph Co. (Lincoln), NYNEX Telephone Companies (NYNEX), Pacific Bell (Pacific), and Rochester Telephone Corporation (Rochester) filed their plans on February 16, 1993. GTE Service Corporation submitted its plan on February 25 on behalf of the GTE Telephone Operating Companies and the GTE System Telephone Companies (collectively, GTE). On March 12, 1993, these filing LECs each submitted additional supporting information requested by the Common Carrier Bureau. After further examination of the plans, the Bureau requested, and received, clarification from GTE and Pacific.

[2] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)(*Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992). The Commission delegated authority to the Chief, Common Carrier Bureau, to consider and rule upon the LECs' plans. *Id.* at 7455 n.416.

[3] *See Expanded Interconnection Order*, 7 FCC Rcd at 7373.

[4] A study area generally consists of a telephone company's operating territory within a given state, although there are certain limited cases in which companies have multiple study areas in a state.

[5] *See* Section 69.123 of the Commission's Rules, 47 C.F.R. § 69.123. An expanded interconnection offering will be deemed to be operational when an interconnector has taken the expanded interconnection cross-connect element. The cross-connect element covers the short cable connection from the LEC distribution frame to the central office electronic equipment owned by or dedicated to the interconnector. *Expanded Interconnection Order*, 7 FCC Rcd at 7442, 7454 n.411.

[6] *See* Section 61.38(b)(4) of the Commission's Rules, 47 C.F.R. § 61.38(b)(4); *see also Expanded Interconnection Order*, 7 FCC Rcd at 7455 and n.415.

B. The Zone Density Plans

5. As a general matter, the LECs followed a three step procedure to develop their zone plans. First, they ranked their wire centers in order of decreasing traffic density. Next, they divided their rank-ordered offices into three groups. These groups were designated zone one, two, and three, where zone one contains the rank-ordered wire center group having the highest traffic density.[7] Finally, most of the LECs adjusted the zone assignments for reasons of geographic contiguity or community of interest between the areas served by the end offices.

6. The LECs used a variety of methodologies to rank their central offices. Several LECs used only interstate traffic to measure central office traffic density,[8] while other LECs used both interstate and intrastate traffic on the theory that using total traffic volume reflects traffic costs more accurately than interstate traffic volume alone.[9] Most of the LECs then converted the switched and special access traffic into equivalent DS1s by which the offices were then ranked from most dense to least dense. Rochester initially considered switched and special access traffic separately before developing a single rank order. Lincoln divided the equivalent MOUs or DS1s for each office by the square miles served by that office to develop its ranking factors.

7. Once the LECs had ranked their offices, they assigned them to one of three zones. As with the ranking of offices, the LECs used different methods of establishing their breakpoints between zones. Some LECs established numerical breakpoints using "logical breakpoints," or a fixed volume level, such as a specific number of DS1 equivalents, to establish which offices would be in which zone.[10] Other LECs, however, explicitly stated that they sought to roughly equalize the traffic or revenues among the zones, assuming that they could thus best maximize their pricing flexibility under the zone pricing rules.[11] Rochester examined characteristics of its offices, such as traffic density, the size of electronic equipment in the central offices, or the type of traffic through each office, to finalize its breakpoints.

8. Finally, most of the LECs made adjustments to the ranking results produced by the first two steps to reflect factors such as geographic contiguity or community of interest between the areas served by the end offices. The following LECs moved the indicated number of offices from zone two to zone one for contiguity or community of interest reasons: GTE (44), NYNEX (1), and Pacific (3). NYNEX also moved five offices from zone three to zone one for contiguity or community of interest reasons. Some LECs assert that, although they examined market conditions to verify that the assignment of certain offices to zones based on traffic density was appropriate, they did not move offices to other zones simply because of competitive reasons.[12]

C. Pleadings

9. On March 26, 1993, seven parties[13] filed comments concerning, *inter alia*, the zone plans of the six captioned LECs.[14] Each of the LECs replied on April 16. Generally, the commenters object to the methodologies employed by the LECs to develop the plans, arguing that the plans used factors not contemplated by the *Expanded Interconnection Order*. They also contend that the plans do not comply with the Commission's requirement that central offices be assigned to zones in a way that reflects their cost-related characteristics. The LECs reply generally that their zone plans reflect the cost-related characteristics of their networks, and that the assignment of offices to zones complies with the requirements of the *Expanded Interconnection Order*. The challenges to the plans and the LECs' responses are discussed in further detail in Section III, *infra*.

III. DISCUSSION

10. In this section, we address the commenters' specific challenges to the six plans and the LECs' responses. As discussed more fully below, we find that the six plans reasonably implement the zone density pricing system established in the *Expanded Interconnection Order*. Therefore, these six plans, as supplemented, are approved,[15] and these LECs may proceed to file tariffs implementing the zone plans on 31 days' notice.[16]

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[7] The Commission permitted LECs to use more than three rate zones in their plans. *Expanded Interconnection Order*, 7 FCC Rcd at 7454 n.413. The plans we approve in this Order, however, all employed a three zone structure.

[8] *See, e.g.*, NYNEX and Pacific zone density plans.

[9] *See, e.g.*, BellSouth zone density plan.

[10] *See, e.g.*, NYNEX and BellSouth zone plans.

[11] *See, e.g.*, Pacific zone plan.

[12] *Id.*

[13] The commenters were Ad Hoc Telecommunications Committee (Ad Hoc); Competitive Telecommunications Association (CompTel); MCI Communications Corporation (MCI); MFS Communications Company, Inc. (MFS); Sprint Communications Co. (Sprint); Teleport Communications Group, Inc. (Teleport); and WilTel, Inc. (WilTel).

[14] On March 23, 1993, MFS filed an Emergency Petition to Hold Proceedings in Abeyance, seeking deferral of the approval of the LECs' zone density plans until the Common Carrier Bureau completes its inquiry into the reasonableness of LEC special access volume and term discounts. The MFS petition was opposed by BellSouth, NYNEX and Sprint. Oppositions to the MFS petition were also filed by the Ameritech Operating Companies, Bell Atlantic Telephone Companies, Southwestern Bell Telephone Company, and United Telephone Companies.

[15] We deny MFS and Teleport's request, *inter alia*, that we defer approval of the zone plans being addressed in this order until we resolve issues concerning the appropriateness of LEC special access volume and term discounts. *See Expanded Interconnection Order*, 7 FCC Rcd at 7458-65. The Bureau is proceeding with its review of the volume and term discount issue. If, as a result of the Bureau's review, the Commission decides to take any action regarding the LECs' special access tariffs, administrative procedures exist to permit the Commission to accomplish that result. Accordingly, we find no reason to delay approving the zone plans considered in this Order.

[16] As a general matter, LECs should not file zone pricing tariffs until such time as they believe expanded interconnection will be operational within 31 days. *Expanded Interconnection Order*, 7 FCC Rcd at 7456 n.419. Each tariff must contain provisions setting forth the rates, terms and conditions applicable to interoffice links. *See* Section 69.123(c)(2) of the

A. Response to General Concerns

11. The commenters raise several concerns with the zone plans that apply to more than one plan. In this section, we respond to these more broadly applicable issues before addressing issues raised by specific plans.[17]

12. *Variations in Methodology.* The LECs have employed a variety of methodologies and measurement units to develop their zone plans and assign end offices among zones. Several parties have criticized the variation in methodologies among the LEC zone plans and argue that the LECs should all be required to use the same methodology and measurement criteria.[18] The *Expanded Interconnection Order* clearly contemplated that more than one methodology would be acceptable when it referenced "cost-related characteristics, such as traffic density or some measure of traffic through each office."[19] Requiring each LEC to use the same method would preclude LECs from reflecting differences in their networks, and the associated costs, or other factors specific to a LEC's operation, in its methodology. Thus, we reject the argument that one methodology or measurement criterion should be imposed upon the LECs for use in designing their zone plans.

13. *Traffic to be Included.* Commenters and LECs dispute whether the LECs should consider only interstate traffic or both interstate and intrastate traffic to develop office rankings. MFS urges the Commission to require the LECs to use only interstate traffic data to measure traffic density, asserting that use of intrastate traffic data contravenes the Commission's Order and could misallocate wire centers among zones.[20] Other commenters, and most LECs, on the other hand, urge the Commission to allow LECs to consider both interstate and intrastate traffic volume, claiming that the *Expanded Interconnection Order* does not restrict LECs to considering only interstate traffic, but rather, that interstate traffic is only one factor LECs must consider.[21] They claim that the amount of total traffic reflects actual costs and drives decisions on interoffice facilities investment, and that use of interstate traffic alone omits important data from the analysis.[22]

14. We conclude that Section 69.123(b) and the *Expanded Interconnection Order* do not restrict the LECs' discretion to use either interstate traffic only, or both interstate and intrastate traffic, in developing their zone density plans. Interstate traffic volume measures the traffic that is subject to the Commission's jurisdiction, while interstate and intrastate traffic volume provides a measure of the total traffic volumes that are transmitted over the LEC network. In discussing the breadth of the data to be used, the Commission favorably contrasted the use of a broader measure, such as total interstate traffic, with a narrower segment of traffic, such as special access alone, which it found to be an insufficient indicator of cost characteristics.[23] It did not proscribe the use of a still broader segment of traffic. We accordingly conclude that the LECs' use of methodologies using both intrastate and interstate traffic, as well as methodologies using only interstate traffic, was reasonable.

15. *Unit of Measure.* In ranking their central offices, the LECs developed a combined measure of both switched and special access traffic by converting MOUs into DS1s, using an appropriate conversion factor.[24] Because the equivalent DS1 approach meets the Commission's requirement to consider office traffic density, we approve the LECs' use of this methodology for ranking offices to reflect cost-related characteristics.

16. *Establishing Zone Breakpoints.* Ad Hoc and CompTel protest the LECs' establishment of breakpoints between zones so that each zone contains roughly one-third of the LECs' revenues.[25] Ad Hoc asserts that revenue figures may not reflect the relative costs of providing service in different end offices. It also argues that maximizing a carrier's pricing flexibility should not be the criterion for establishing breakpoints.[26] LECs establishing breakpoints to achieve a roughly equal share of revenues among zones argue that this allows the LECs to use the full amount of pricing flexibility allowed by the Commission, consistent with the Commission's purpose in establishing zone pricing.[27]

17. MFS and WilTel assert that LECs should be required to create their zone boundaries using the cost structures of different carrier systems. They contend that using equipment capacities to create zone boundaries is a sensible alternative to other, more subjective methods the LECs propose.[28] Ad Hoc argues that the carriers' selection of breakpoints appears to be arbitrary or, at least, insufficiently explained. LECs commenting on this idea oppose the suggestion that they provide underlying costs to support their selection of breakpoints, or that breakpoints be

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Commission's Rules, 47 C.F.R. § 69.123(c)(2). Tariffs implementing zone pricing shall incorporate any changes required as a result of the *1993 Annual Access Order*.

[17] We do not address in this Order CompTel's argument that any zones approved for special access should not be applied in the context of expanded interconnection for switched transport. The question of whether a zone pricing plan is appropriate in the context of expanded interconnection for switched transport, and the nature of any such zones, is not an issue raised by these filings, and will be addressed in CC Docket No. 91-141, Phase 1. *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking, 7 FCC Rcd 7740 (1992).

[18] *See, e.g.*, MFS Comments at 5-7 (arguing that all LECs should use equivalent interstate DS1s); CompTel Comments at 5-7 (arguing that all LECs should be required to use density per square mile).

[19] *Expanded Interconnection Order*, 7 FCC Rcd at 7455.

[20] MFS Comments at 6.

[21] CompTel Comments at 6 n.6; WilTel Comments at 7-8 and n.10; BellSouth Reply at 3-5; Pacific Reply at 16-18.

[22] WilTel Comments at 8; Pacific Reply at 17-18.

[23] *Expanded Interconnection Order*, 7 FCC Rcd at 7455 n.415.

[24] Lincoln used the number of lines in each wire center, which it then divided by the square miles served by an office to develop the ranking factor for its plan. It states that dividing by square miles did not change any of its office rankings sufficiently to require their movement into a different zone. Lincoln Filing at 2. Accordingly we evaluate Lincoln's plan based on equivalent DS1s, rather than the density per square mile ranking methodology, and do not reach the issue of the appropriateness of density per square mile in ranking offices, which was challenged by MFS. *See* MFS Comments at 7-8.

[25] Ad Hoc Comments at 8-9; CompTel Comments at 8-9.

[26] Ad Hoc Comments at 9; *accord* CompTel Comments at 8-9.

[27] *See, e.g.*, Pacific Reply at 19-20.

[28] MFS Comments at 8; WilTel Comments at 6-7.

established to correspond to specific facilities, arguing that the Commission did not establish such requirements in the *Expanded Interconnection Order*.[29]

18. We conclude that the LECs have selected their breakpoints in a reasonable manner. Their central office rankings often show that no clear breakpoints exist. For the larger LECs especially, there is often a continuum of office densities, and several different breakpoints could reasonably be selected as the line between zones. The breakpoints the LECs selected are reasonable. We find that the reliance by some LECs on the goal of equalizing revenues among zones does not undermine the reasonableness of the breakpoints they selected. These LECs ranked their central offices using measures of traffic density. No office was assigned to a zone other than that indicated by its traffic density level, unless it was moved for reasons of geographic contiguity or community of interest. Accordingly, we find that the LECs have grouped their offices in zones in a manner that reflects similar cost-related characteristics, as required by the rules.

19. We reject the requests that we should require additional cost data to assist in defining the breakpoints. The rules permit LECs to establish zones based on traffic density data as a surrogate for cost data. The rules do not require the LECs to rely on actual cost data to identify breakpoints. Moreover, as filed by the carriers, the zone plans produce office classifications that group offices with similar density characteristics, and thus cost-related characteristics, into the same zone. Although additional cost data might reveal other reasonable breakpoints, it would not change the reasonableness of the breakpoints selected by the carriers. We believe the LECs' breakpoints between zones are reasonable.

20. *Treatment of Multiplexers.* MFS argues that charges for multiplexing services should be excluded from the LECs' zone tariffs. MFS contends that the LECs' costs of providing multiplexing services do not vary with the volume of traffic.[30] Pacific asserts that multiplexing equipment placed in high-density areas is designed to perform more functions than multiplexing equipment in lower-density areas. Pacific argues that multiplexers in high-density areas will have lower per-unit costs, as the total cost of the equipment to the LECs can be distributed among more services.[31] We reject MFS's argument. The rules permitted the LECs to file zone plans for special access services, and multiplexing charges are part of the LECs' special access tariffs. MFS' objection is merely a request for reconsideration of the Commission's Order.

21. *State-Specific Tariffs.* MCI asserts that BellSouth and NYNEX should refile their zone plans using their existing company-wide special access rate structure rather than state-specific rates. MCI asserts that these companies are attempting to circumvent the implementation of zone pricing in their full serving territories. By offering state-specific rates, it argues, these LECs will prevent zone pricing from becoming effective in a state until a collocator takes expanded interconnection in that state. Moreover, MCI contends, although they filed state-specific rates in their zone plans, these LECs filed company-wide expanded interconnection tariffs. MCI argues that these companies seek to disaggregate their special access rates into state-specific rates to achieve strategic goals in their zone pricing plans. It claims that this strategy contravenes the intent of the Commission's Order that assignment of central offices to zones be driven by cost characteristics. Finally, MCI argues, state-by-state tariffs are discriminatory because the cost of serving customers served by wire centers in the highest density zones would be the same as the cost of serving similarly situated customers in states in which expanded interconnection is not operational, although the customers would pay different rates depending on whether collocation exists in that state.[32]

22. BellSouth and NYNEX respond by asserting that the Commission's Order expressly declares that tariffs implementing zone density pricing are limited to those study areas in which expanded interconnection is operational.[33] GTE also submits that state-specific rates are not discriminatory, because there are differences among states in traffic density, market conditions, costs, and operating conditions.[34]

23. Commenters' opposition to the use of state-specific tariffs is misplaced. Section 69.123(a) specifically states that LECs may establish rate zones within study areas and contemplates the study area by study area implementation of zone density pricing. Moreover, because expanded interconnection is likely to become operational in different states at different times, state-specific tariffs are necessary if LECs are to be able to introduce density pricing in a study area at or near the time expanded interconnection becomes operational in that state.[35] Accordingly, we find that state-by-state tariffs will not produce unreasonably discriminatory rates.

B. Response to Plan Specific Issues

24. We have reviewed the challenges to specific plans, and related pleadings. In particular, we have reviewed the individual ranking methodologies, the determination of the breakpoints, and any shifts of central offices from one zone to another to reflect contiguity or community of interest.[36] We conclude that the zone plans reflect cost-related characteristics based on traffic density as the Commission intended in the *Expanded Interconnection Order*. Accordingly, we approve the plans, as supplemented. Below, we respond to some specific challenges to individual plans.[37]

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[29] *See, e.g.*, NYNEX Reply at 6-9.

[30] MFS Comments at 8 n.8.

[31] Pacific Reply at 24-25.

[32] MCI Comments at 4-6.

[33] *See, e.g.*, NYNEX Reply at 12; BellSouth Reply at 9, *citing Expanded Interconnection Order*, 7 FCC Rcd at 7455 n.417.

[34] GTE Reply at 9-10.

[35] The limitation of zone density pricing to study areas in which operational expanded interconnection exists ensures that the connection between increased competition and LEC pricing flexibility is preserved. LECs that file consolidated access tariffs for multiple study areas may also file consolidated density pricing tariff revisions applicable to all of the study areas in which expanded interconnection is operational. *Expanded Interconnection Order*, 7 FCC Rcd at 7455 and n.417. The Commission did not require the LECs to file consolidated density zone plans.

[36] Lincoln and BellSouth did not reassign any offices from one zone to another based on contiguity.

[37] Several commenters have alleged that LECs have moved offices for competitive or market-based reasons not permitted by the Commission's Order. *See, e.g.*, MCI Comments at 3; MFS Comments at 9. Although several of the LECs state that they used these, or similar, considerations to check the reasonable-

25. *GTE.* Ad Hoc protests GTE's movement of offices based on contiguity if an office's location is within twenty-five miles of a major metropolitan area served by another LEC.[38] On June 7, 1993, GTE filed an amendment to its plan withdrawing its request to use the twenty-five mile rule to classify offices as zone one. Subsequently, GTE further modified its plan by dropping its request to move the Hobart, Indiana office from zone two to zone one for contiguity reasons.[39] We have reviewed GTE's plan, as amended, and conclude that it reasonably implements the Commission's zone pricing rules. Accordingly, we approve GTE's amended zone pricing plan.

26. *NYNEX.* MFS and MCI challenge NYNEX's reclassification of five Manhattan offices and one Boston office.[40] NYNEX states in its plan filings that the five Manhattan offices are in New York Telephone's most dense geographic area. It claims, on average, the traffic density per central office located in Manhattan south of 59th Street is over 10 times the average density per central office in the New York study area.[41] It asserts that the Boston office is one of four central offices in downtown Boston that are treated as a single rate zone in New England Telephone and Telegraph's state tariffs. The other three offices located in the Boston local exchange area, it asserts, are all zone one offices.[42] We have reviewed the maps accompanying NYNEX's plan filing, which indicate that the offices at issue are contiguous with nearby higher-density zone offices and reasonably can be said to share a community of interest with those offices in the higher-density zone. We therefore conclude that NYNEX's movement of these offices to higher-density zones was consistent with the requirements of § 69.123 of the Commission's Rules and the *Expanded Interconnection Order.*

27. *Pacific.* Ad Hoc, MCI and WilTel argue that Pacific's proposal should be rejected because it uses several criteria to shift offices between zones that were not contemplated by the Commission.[43] On June 7, 1993, Pacific amended its zone plan to rely on its equivalent DS1 rankings for its principal assignment methodology, placing 37 offices in zone one. It then proposed to reassign three offices from zone two to zone one for contiguity reasons. We have reviewed this amended plan, including the contiguity of the three offices to other zone one offices. We find that the plan rectifies the defects identified in the comments and, as amended, complies with the Commission's zone pricing rules. Accordingly, Pacific's amended plan is approved.[44]

28. *Rochester.* Several commenters contend that Rochester considered separate traffic measurements for switched and special access traffic for each office and used subjective methods, such as the relative mix of residential and business traffic, to combine those measurements into a single ranking system.[45] Rochester replies that it properly exercised its discretion to assign end offices to particular zones.[46] It claims that it used the relative mix of business and residential traffic as a surrogate for traffic density -- and, hence, costs -- and not as an indicator of subjective or competitive considerations.[47]

29. Rochester ranked its offices on the basis of the number of channel terminations and then considered whether the switched traffic in any office would cause any office to shift between zones. MCI's concern with the assignment of offices to zones relates to three offices -- Phillips Road, Lexington Avenue and Field Street -- which, Rochester claims, rank in traffic density at a midpoint between offices properly assigned to zone one and others properly assigned to zone two.[48] In deciding to place these three offices in zone two, rather than in zone one, we conclude that Rochester appropriately considered the business/residential mix as part of the process of assigning borderline offices to a zone. In any event, because the three offices in question were not classified out of rank order, we find that the Rochester plan reasonably reflects cost-related characteristics based on traffic density.

C. Other Issues

30. CompTel asserts that the Commission should require the LECs to create separate zones for interoffice links and channel terminations because the cost characteristics of interoffice transport differ from those related to channel terminations.[49] CompTel also urges the Commission to issue benchmark guidelines to direct LECs on the preparation of rates for interoffice transport consistent with the characteristics of interoffice traffic.[50] LECs opposing the creation of separate zones for interoffice links and channel terminations argue that such a step would be inconsistent with the *Expanded Interconnection Order* and is an untimely request for reconsideration.[51]

31. We dismiss CompTel's argument as an untimely request for reconsideration. Under the Commission's rules, LECs should employ traffic density at central offices to assign those offices to zones and must use those zone classifications to determine the relative prices of the interoffice links in different zones. Pursuant to § 69.123(c)(2),

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ness of their plans, our review of the plans as amended reveals that the movement of offices among zones is justified by either geographic contiguity or shared community of interest reasons standing alone. Accordingly, we reject the contentions that the LECs used inappropriate competitive considerations to reassign offices to zones.

[38] Ad Hoc Comments at 10-11. GTE sought to place a central office in zone one if: (1) It has at least 56 DS1 equivalents; or (2) It has at least 38 DS1 equivalents and is next to a GTE zone one office. GTE also sought to place a central office in zone one if the office had at least 38 DS1 equivalents and was within 25 miles of a major metropolitan area served by another exchange carrier. On May 25, 1993, GTE supplied maps identifying the offices that it moved among zones.

[39] *See* letter from F. Gordon Maxson, Director - Regulatory Affairs for GTE, to Donna Searcy, Secretary, Federal Communications Commission (June 17, 1993).

[40] MCI Comments at 9; MFS Comments at 11-12.

[41] NYNEX Plan at 5.

[42] *Id.* at 4-5 and 5 n.9.

[43] Ad Hoc Comments at 8; MCI Comments at 9-10; WilTel Comments at 9.

[44] Nevada Bell did not file a zone density plan.

[45] MCI Comments at 7 n.10; MFS Comments at 4-5.

[46] Rochester Reply at 4-5.

[47] *Id.* at 5.

[48] The Bureau, using the data supplied by Rochester, verified that these three offices were ranked below the zone one offices and above the other zone two offices on a DS1-equivalent basis.

[49] CompTel Comments at 9-13.

[50] *Id.* at 11-13.

[51] *See, e.g.,* BellSouth Reply at 5-6.

interoffice links must be priced at the rates for the lowest density office associated with the link. CompTel's arguments would have us require pricing that is not consistent with the rule.

32. Ad Hoc suggests that the Commission use a "good actor" test to establish the carriers' intentions to engage in fair competition prior to allowing the zone plans to become effective.[52] This proposal does not relate to compliance with our rules for proper implementation of zone pricing plans, as adopted in the *Expanded Interconnection Order*. Rather, Ad Hoc's proposal would impose an additional requirement on the LECs. Accordingly, Ad Hoc's request is dismissed as beyond the scope of this proceeding.

33. Finally, we do not reach the issues raised by Ad Hoc and Sprint concerning possible future changes to the zone plans, to the office assignments within the zone plans, or to the principles that will govern what changes may be allowed. This proceeding is limited to the implementation of the initial zone plans of the LECs. Issues concerning future changes are more appropriately considered on reconsideration of the *Expanded Interconnection Order* or as challenges to such changes should they occur.

IV. CONCLUSION

34. We have reviewed the captioned zone density pricing plans as supplemented, the comments thereon, the replies, and the additional supporting materials filed by the parties in this proceeding. We find that the plans reasonably implement the zone density pricing scheme envisioned by the Commission in the *Expanded Interconnection Order*. We therefore approve the plans.

V. ORDERING CLAUSES

35. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the zone density pricing plans filed by BellSouth Telecommunications, Inc., GTE Service Corporation, Lincoln Telephone and Telegraph Co., NYNEX Telephone Companies, Pacific Bell, and Rochester Telephone Corporation ARE APPROVED.

36. IT IS FURTHER ORDERED that the Emergency Petition to Hold Proceedings in Abeyance, filed by MFS Communications Company, IS DENIED to the extent it relates to the plans approved by this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[52] Ad Hoc Comments at 6-7. Ad Hoc asserts that a LEC's zone plan should be approved when the presence of competition is shown by: (1) the LEC's development and tariffing of reasonable interconnection arrangements; (2) the LEC's provision of physical collocation opportunities; and (3) the existence of a satisfactory CAP/LEC relationship under the interconnection arrangement.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 92-88

and

Emery Telephone

Joint Petition for Waiver of the
Definition of "Study Area" contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Emery Telephone

Petition for Waiver of Sections 61.41(c) and
69.3(e)(11) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1993; Released: June 25, 1993

By the Deputy Chief (Operations), Common Carrier Bureau:

1. In this Order we consider a joint petition filed by US West Communications, Inc. (US West) and Emery Telephone (Emery) for waiver of the Commission's rules regarding a study area change, and a petition by Emery for waiver of the Commission's price cap rules.

I. INTRODUCTION AND BACKGROUND

2. On October 9, 1992, US West and Emery filed a joint petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules. On October 21, 1992, Emery filed a petition for waiver of Sections 61.41(c) and 69.3(e)(11) of the Commission's rules, requesting permission to remain a cost company, and NECA pool participant. The parties filed a supplement to the joint petition on November 4, 1992, containing an order of the Utah Public Service Commission. We placed both petitions and the supplement on public notice on November 6, 1992.[1] No comments were received.

II. STUDY AREA WAIVER

3. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984.[2] Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[3] that the state commission(s) having regulatory authority not oppose the change,[4] and that the public interest be served.

4. The service area in question here, the Green River exchange, is being sold by US West to Emery. The exchange consists of 604 access lines. The parties state that this transaction will have no impact on high cost fund support or on the separations factors.

A. Universal Service Fund (USF) Impact

5. USF support is calculated based on the cost per loop; carriers are eligible for USF support if their cost per loop is at least 115% of the national average. US West's cost per loop for the entire Utah study area prior to the sale is below the national average. Emery's loop cost after the acquisition of both the Huntington exchange[5] and the Green River exchange is slightly higher than the national average but is still below the minimum necessary to receive high cost assistance.[6] The joint petition states that neither company currently receives USF support, and that neither company will receive USF support after the study area change. The showing fully addresses our concerns about USF impact.

B. State commission approval

6. The supplemental filing made on November 4, 1992, contains the Order of the Public Service Commission of Utah approving this transaction.[7] This commission action addresses our concerns regarding state approval.

C. Public Interest

7. The joint petition states that the public interest is served by the waiver request. The consolidation of various telephone services with the Emery service area plus Em-

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[1] Public Notice, DA 92-1535, released Nov. 6, 1992.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*Joint Board Order*) at para. 65.

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] We granted Emery a waiver to reflect its purchase of the Huntington exchange from US West last year. *See* US West Communications, Inc. and Emery County Farmers' Union Telephone Association, Memorandum Opinion and Order, 7 FCC Rcd 6076 (1992).

[6] The Joint Petition states that the sale of the Green River exchange does affect US West's average loop cost in Utah, decreasing it by some 36 cents. Emery's average loop cost after the acquisition of the Green River exchange is $237.67, slightly higher than the national average loop cost of $231.09, but not at a level that would justify high cost support.

[7] Docket Nos. 92-042-02 and 92-049-12, Order Approving Sale of Assets and Amending Certificates, issued October 23, 1992.

ery's plans to install a new digital switch in the area will enhance service efficiency and customer satisfaction. We agree that the public interest is served by the sale and transfer of the Green River service area from US West to Emery.

III. PRICE CAPS WAIVER

8. On October 21, 1992, Emery filed a petition for a declaration of inapplicability of the Commission's rules governing the acquisition of price cap companies by non-price cap companies, or alternatively, for waiver of those rules.

9. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[8] Under this rule, Emery's acquisition of the US West exchange obligates it to exit the NECA pools and become subject to price cap regulation. Emery requests waiver of this rule because the rule's application here would be contrary to the public interest. Emery notes that a major factor in the Utah commission's approval of the transfer and sale was Emery's commitment to upgrade the quality of local exchange service in Green River by installing a digital switch. Emery states that it is a small cost company and participates in the NECA pool, and that continued participation in the pools is essential to the financial integrity of the company and the maintenance of telephone service to its rural and small-town customer base.

10. Further, Emery states, it has no incentive, ability, or inclination to "game" the Commission's price cap policies. Emery accordingly requests a waiver of the §61.41 "all or nothing" rule and of the concomitant effects of §69.3. Emery notes that there is no relationship between US West and Emery that would allow either company to shift costs as a consequence of this sale, and that neither is using this sale as a means of choosing a different system of regulation than the *status quo*. Finally, Emery states that a requirement that Emery withdraw from the NECA pools and operate as a price cap company would subject Emery to administrative and financial burdens that would jeopardize the company's ability to meet its technological upgrade commitments to customers.

11. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[9] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706. The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

12. There is good cause to grant Emery a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at issue here. Neither Emery nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for exchanges it has sold, US West remains regulated under price caps; it retains no ability to bring any exchange it has sold back under price caps.

13. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[10] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preference, particularly for small carriers.

14. We therefore grant a waiver of the all-or-nothing rule. For the present, Emery will be regulated under rate of return. Emery also requests waiver of Section 69.3, to allow it to remain a participant in the NECA pools. *See* note 12, *supra*. Because we are waiving Section 61.41, allowing Emery to remain under rate of return regulation, Emery need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, Emery will be free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

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[8] 47 C.F.R. §61.41(c)(2). Emery also requests waiver of a related rule, Section 69.3(e)(11), to allow Emery to remain in the NECA pools.

[9] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[10] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988) (*Small Company Order*).

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of US West Communications, Inc. and Emery Telephone for waiver of Part 36, Appendix-Glossary, of the Commission's rules IS GRANTED to the extent discussed above.

16. IT IS FURTHER ORDERED that the Petition of Emery Telephone, for waiver of Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. Section 61.41(c)(2), IS GRANTED.

17. IT IS FURTHER ORDERED that the Petition of Emery Telephone, for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. Section 69.3(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PowerSpectrum, Inc.

Request for Rule Waiver

ORDER

Adopted: June 25, 1993; Released: June 28, 1993

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. The Bureau has before it a Request for Rule Waiver filed October 9, 1992, by PowerSpectrum, Inc. (PSI).[1] By assembling spectrum previously licensed to entities that have failed to put it to productive use, PSI plans to create a mobile communications system that will employ an innovative technology to provide high quality voice, data and other services to 900 MHz Specialized Mobile Radio (SMR) customers. PSI contends, however, that in order for its system to be implemented as envisioned, we must waive the Commission's rules that (1) require trunked SMR facilities to be constructed and placed in operation within one year of licensing, 47 C.F.R. §§ 90.631(e) and (f); and (2) impose certain loading requirements, 47 C.F.R. § 90.631(b). In addition, to persuade us of its commitment to construct this ambitious system and place it in operation, PSI has offered to devise a strict construction schedule and to submit quarterly reports monitoring its compliance therewith. In this same vein, PSI has also indicated its willingness to agree to a provision conditioning the grant of its waiver upon satisfaction of its construction benchmarks.

2. Our review of the record convinces us that grant of PSI's waiver request will further the public interest. PSI has demonstrated that its proposed system is technically innovative, spectrally efficient, and responsive to the needs of the SMR marketplace. These considerations, while decisionally significant, nevertheless do not, standing alone, justify relief. In view of the fact that a large portion of the spectrum to be utilized in PSI's system has lain fallow for several years as part of a waiver granted to Millicom Radio Telephone Company, Inc. (Millicom),[2] we believe that a waiver applicant such as PSI must provide some type of assurance evincing its commitment to put the spectrum affected by its request to productive use in a timely manner. We are convinced that stringent enforcement of PSI's construction schedule will most effectively serve this purpose here. Accordingly, we are conditioning the grant of PSI's request for waiver on the company's compliance with each of the construction deadlines specified in its extended implementation schedule. Should PSI fail to meet any of the specified dates, it will be given one year from the missed date to construct its entire system. If PSI does not satisfy the one-year construction requirement, its authorizations for all unconstructed stations will cancel automatically.

II. BACKGROUND

3. **The 900 MHz SMRS.** The Commission began issuing licenses for 900 MHz SMR operations in 1987, pursuant to a two-phase procedure set forth in Gen. Docket No. 84-1233[3] and a Public Notice dated November 4, 1986.[4] During Phase I, the agency began accepting applications for stations in 46 designated filing areas encompassing the 50 top markets in the country. All of the initial Phase I license grants have been made. A sizable number of these licensees have, however, failed to construct and place their systems in operation within the one-year period prescribed by 47 C.F.R. §§ 90.631(e) and (f), and their licenses have cancelled automatically.[5] This has delayed the introduction of service and thwarted the development of 900 MHz SMR operations. As further evidence of the difficulties associated with SMR operations in the 900 MHz band, many of those licensees that have been able to satisfy our construction and operational requirements have been unable to find a sufficient number of customers to permit compliance with the deadline for loading 900 MHz SMR systems.[6]

4. The Commission is currently soliciting comment on the best method for licensing under Phase II. It was initially thought that during Phase II, applications would be accepted for facilities located within a 100-mile radius of the urban center of each of the 50 largest markets. The Commission now questions whether such an artificial restriction might adversely affect the development of the 900 MHz SMR service, and has proposed an alternative licensing scheme.[7]

5. Another seminal component in the development of 900 MHz SMR operations is a request for waiver filed in August, 1989 by Millicom Radio Telephone Company,

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[1] Rule Waiver Request filed October 9, 1992, by PowerSpectrum, Inc. [hereinafter *Waiver Request*]. PSI also submitted several letters supplementing its initial waiver request. These supplemental filings are dated November 12, 1992; November 16, 1992; December 16, 1992; January 13, 1993; February 9, 1993; February 24, 1993; March 4, 1993; March 31, 1993; May 5, 1993; May 19, 1993; and May 24, 1993.

[2] *See* para. 5, *infra*.

[3] Report and Order, Gen. Docket No. 84-1233, 2 FCC Rcd 1825 (1986).

[4] Private Land Mobile Applications Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986). *See also* Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd 8673, 8674 (1989).

[5] Our records reflect that roughly one-third of the 900 MHz SMR authorizations granted during Phase I have been cancelled. Specifically, of the 833 licenses granted, 249 have been cancelled for failure to construct.

[6] Report and Order, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

[7] *See generally* First Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469

Inc. (Millicom).[8] In its waiver, Millicom sought relief from our construction and loading requirements so that it could build a two-way data and voice communications network in the 900 MHz SMR band. In order to secure spectrum for its proposed system, Millicom planned to negotiate management agreements with a number of previously-issued 900 MHz SMR licensees. We granted Millicom's request for waiver on May 18, 1990.[9] Under the terms of the waiver, Millicom was given three years to construct its system. Stations that were part of the Millicom network that were built in accordance with the construction deadline were then to be loaded in four years.[10] Millicom has apparently been unable to proceed with the full construction and implementation of its network. Pertinent here, PSI and Millicom recently entered into an agreement pursuant to which PSI will ultimately acquire all of Millicom's interests in the authorizations held either by Millicom or by other licensees that were to be part of the Millicom network.[11] PSI plans to combine this spectrum with that acquired from various other sources to assemble the wide-area communications network that forms the basis of this waiver request.

6. **PSI's Waiver Request**. PSI contends that its proposed system will enhance 900 MHz SMR operations in a manner consistent with the objectives enunciated in PR Docket 89-553. For example, PSI underscores the fact that its system is a wide-area network, and therefore responsive to the needs of mobile communications customers. In addition, PSI stresses the spectrally efficient nature of its proposed network. Specifically, PSI states that the "digital frequency hopping multiple access" (FHMA) technology it plans to use will allow it to transmit high quality communications to approximately 100,000 customers per market employing only forty 12.5 kHz-wide channels.[12] This newly-developed technology represents an increase in system capacity of thirty times that of present-day analog systems.[13] PSI also contends that its network will be of value to consumers historically reliant on traditional SMR offerings because it will have the technical capability to transmit a service package uniquely adaptable to the specific needs of each user. Furthermore, as aforementioned, in recognition of the Commission's concern with respect to the qualifications of 900 MHz licensees, PSI has offered to demonstrate the level of its commitment by volunteering to submit a strict construction schedule to be monitored quarterly, and by proposing that its waiver grant be conditioned on compliance with the specified construction deadlines.[14]

III. RELIEF REQUESTED

7. As mentioned, PSI is assembling the spectrum for its system entirely through the acquisition of previously-issued 900 MHz SMR licenses.[15] PSI has already secured licenses for thirteen 900 MHz SMR stations in various markets throughout the country. The facilities associated with each of these authorizations were constructed at the time that the licenses were transferred to PSI. In addition, another ten stations are subject to pending assignment applications or finder's preference requests filed by PSI or one of its wholly owned subsidiaries. The facilities associated with these stations are also constructed. Finally, PSI or one of its wholly owned subsidiaries has entered into exclusive management agreements to operate an additional thirty-five systems.[16] Most of the facilities associated with these authorizations have not been constructed.[17]

8. PSI maintains that in order to construct and operate its system, it requires a four year extended implementation period as well as relief from ordinary interim loading and operational requirements. Accordingly, PSI requests waiver of 47 C.F.R. §§ 90.631(b), (e), and (f) with respect

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(1993).

[8] Request for Waiver filed August 29, 1989 by Millicom Radio Telephone Company, Inc.

[9] Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Robyn C. Nietert (May 17, 1990).

[10] *Id.* Under the terms of the Millicom waiver, failure to satisfy any construction deadlines would result in automatic cancellation of that individual license.

[11] Letter from Millicom Radio Telephone Company, Inc. to Ralph A. Haller, Chief, Private Radio Bureau (January 12, 1993). Significantly, the parties have represented that as a result of their transaction, Millicom will recover only the costs of any construction that has been completed, and will not realize either a direct or indirect profit from its apparent failure to perform in accordance with the terms and conditions of the waiver grant. We accept this representation that no profit will accrue to Millicom, but note that if we find to the contrary, this could raise questions as to the parties' basic qualifications to be Commission licensees. *See* Pass Word, Inc., 76 FCC 2d 465 (1980), *aff'd per curiam* Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir.), *cert. denied*, 459 U.S. 840 (1982).

[12] FHMA is a digital technology that utilizes spectrum comprised of several pre-designated channels. Transmissions are digitized and time-slotted in a manner similar to conventional time division multiple access with additional error correction coding. The radio transmitter hops between the designated frequencies, as many as 250 times per second, with every burst of information transmitted on a different frequency from the preceding burst. On the receiver side, the same hopping sequence is used and the stream of data bursts is reconfigured. *Waiver Request* at 8-9.

[13] Supplement to Waiver Request filed March 31, 1993, by PowerSpectrum, Inc.

[14] PSI initially offered to demonstrate its commitment by posting a voluntary performance bond in the amount of $50,000.00 per market. In a supplemental filing dated May 19, 1993, PSI suggested in the alternative that we tightly monitor its extended implementation schedule and that its waiver be conditioned on the timely construction of its facilities. Although we have decided to pursue this latter option, we note parenthetically that the Commission is currently exploring the utility and lawfulness of performance bonds in other contexts. *See, e.g.*, Notice of Proposed Rule Making, PR Docket No. 93-144, at para. 41 (adopted May 13, 1993); First Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993).

[15] No new 900 MHz SMR licenses are currently being issued.

[16] PSI has indicated that it is authorized to seek waivers on behalf of the licensees with whom it is entering into management agreements, and to commit these licensees to the conditions on their licenses that PSI has proposed.

[17] In a supplemental filing dated May 5, 1993, PSI withdrew its request for waiver of 47 C.F.R. § 90.609(b), which prohibits the transfer or assignment of a license to operate a conventional or trunked radio system prior to the completion of construction. In this modification to its original waiver request, PSI clarifies that any unconstructed SMR facilities will only become part of its system through an exclusive management agreement with each licensee.

to the following categories of stations: (1) those for which PSI is currently licensed, with facilities that either are constructed or that were constructed at the time that PSI received its authorization, but that PSI wishes to deconstruct or leave unconstructed pending reconstruction with digital radio technology in accordance with its construction schedule; (2) those that are the subject of management agreements, with construction deadlines that have not yet passed, but that PSI seeks permission to leave unconstructed in accordance with the construction schedule it submits; (3) those that are the subject of management agreements and that it asserts are "legitimately unconstructed" under the terms of the waiver granted to Millicom on May 17, 1990; and (4) four stations, also the subject of management agreements, located in Rochester and Buffalo, New York, that have not been constructed or placed in operation in accordance with the rules, but that are also assertedly "legitimately unconstructed."[18]

9. In support of its request for waiver, PSI contends that the complexity of its system and the fact that the technology it plans to use is currently under development render compliance with our construction and loading requirements impossible. In addition, PSI claims that waiver of Section 90.631 is appropriate because its proposal is innovative, spectrum efficient, and responsive to the needs of the SMR marketplace. PSI also maintains that grant of the relief it seeks will further the public interest by promoting use of the 900 MHz SMR band.[19] PSI urges that such a result is consistent with the Commission's statutory obligation to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more efficient use of radio in the public interest." In this same vein, PSI likens its request to the rule waiver granted to American Mobile Data Communications, Inc. (AMDC),[20] and contends that its request satisfies the well-established criteria used to evaluate requests of this nature.[21]

IV. DISCUSSION

10. At the outset, we agree with PSI that its request satisfies the standard used to ascertain whether waiver of Part 90 rules is appropriate. *See* 47 C.F.R. § 90.151. Specifically, PSI has demonstrated (1) that unique circumstances are involved, and (2) that there exists no reasonable alternative solution within our rules.[22] With respect to the first prong of this test, we note initially that PSI's proposal is premised on the use of an innovative, novel technology that will greatly expand the service options available to SMR users. In addition, PSI's proposed system design is unique in that it is highly spectrum efficient. Indeed, the number of customers that PSI plans to serve using only forty 12.5 kHz-wide channels makes it one of the most efficient SMR proposals to date. The Commission has previously held that proposals offering new benefits and efficiencies to users and utilizing an innovative system design are precisely the type that warrant relief under the first portion of Section 90.151. *See In re Fleet Call, Inc.*, 6 FCC Rcd 1533, *recon. dismissed*, 6 FCC Rcd 6989 (1991); *In re American Mobile Data Communications, Inc.*, 4 FCC Rcd at 3804. PSI has also demonstrated that no alternative solution within the Commission's rules will afford it adequate redress. Specifically, PSI's pleadings reflect that due to the complexity of its system and the time needed to complete the development of FHMA technology, waiver of our normal construction and loading requirements is imperative.[23]

11. In light of our experience with the cancellation of 900 MHz SMR licenses and the widespread failure of 900 MHz SMR licensees to implement their communications systems, however, we view this agency as having a particularly strong responsibility to ensure that licenses are awarded only to those entities that demonstrate an actual ability to use the spectrum productively. Hence, an innovative, market responsive proposal is insufficient to warrant the grant of a waiver involving the type of relief requested here. PSI seeks access to a substantial amount of spectrum that will comprise a highly valuable communications network. Significantly, it is well within the Commission's authority simply to reclaim the frequencies involved in PSI's request and ultimately relicense them in accordance, for example, with our recent proposals for licensing in the 900 MHz band. By proceeding in such a fashion, the Commission could guarantee the qualifications of each licensee through the imposition of strenuous entry criteria. The mere existence of this option exemplifies our obligation to examine carefully the qualifications of PSI or any future applicant in a similar posture.

12. Moreover, it is not only the quantity of spectrum involved in PSI's waiver that gives us pause, but also the amount of time PSI asks to be given to construct its system and place it in operation. Granting PSI the relief it requests in effect means that for four years, the productivity of a substantial portion of spectrum will lie solely in

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[18] PSI has entered into management agreements with respect to these stations. The agreements were executed and PSI's request covering extended implementation of these systems was submitted before the time that the stations should otherwise have been placed in operation. *See* Supplement to Waiver Request filed by PowerSpectrum, Inc. December 16, 1992. In its original waiver request, PSI also sought waiver of 47 C.F.R. §§ 90.621(a)(1)(iv) and 90.627, which limit the number of frequency pairs that may be assigned to a licensee in a single market, as well as waiver of the relevant portions of Section 90.621 so that it could use its authorized channels on a primary basis throughout its service area. In a supplemental filing dated March 4, 1993, PSI withdrew these portions of its waiver request.

[19] *Waiver Request* at 21-22.

[20] *See* In re American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989).

[21] *Waiver Request* at 21.

[22] *But see* Report and Order, PR Docket No. 92-210 (adopted May 13, 1993) (amending 47 C.F.R. §§ 90.629 and 90.631 to lengthen the maximum extended implementation period from three to five years, and to permit SMR applicants to qualify for extended implementation authority). The rule changes adopted in PR Docket No. 92-210 are not yet effective. If these rule changes were effective, PSI and the licensees of its managed systems would be able to seek extended implementation authority directly under the rules without the need for a waiver.

[23] PSI indicates in its request for waiver that it is in the process of securing additional interests in 900 MHz SMR authorizations, either through assignment or management agreements, and asks us to extend the relief granted in this *Order* to these additional stations. We do not think that a blanket waiver grant of this nature would serve the public interest. Moreover, we note that under the rule changes adopted in PR Docket No. 92-210, *see supra* note 22, waiver may not be necessary.

the hands of one licensee. This is an especially important consideration in view of the fact that most of the frequencies associated with PSI's request are being passed on for the third time -- from the initial licensee to Millicom, and now to PSI.

13. Although the type of guarantee that we are looking for as a means to ensure an applicant's commitment may vary from case to case, we are satisfied that stringent enforcement of PSI's construction schedule[24] will serve this purpose in the instant matter. As indicated, PSI's waiver grant is conditioned on the company's compliance with its construction schedule. Specifically, if PSI fails to satisfy any of the dates set forth in the schedule without securing prior Bureau approval, its extended implementation authority will cancel automatically, and it will be given one year from the missed date to complete the construction of its entire system and place it in operation. If PSI fails to construct the system and place it in operation within this one-year period, its authorizations for any stations that are not constructed and operating will cancel automatically, as will the licenses of those stations on whose behalf PSI is seeking a waiver under a management agreement. In our view, this enforcement scheme serves several important purposes. First, the fact that PSI has agreed to the stringent enforcement of its construction deadlines illustrates the extent of the company's commitment to timely complete its system in the manner proposed. In addition, such a substantial condition on the waiver grant provides further incentive for PSI to use the spectrum productively. Finally, the provision calling for the automatic cancellation of all unconstructed stations serves the public interest by expediting the recovery of any unused spectrum.

V. CONCLUSION

14. In summary, we are granting PSI's request for waiver of 47 C.F.R. §§ 90.631(b), (e) and (f). Waiver of these rules will serve the public interest by promoting the development of a 900 MHz SMR industry that is diverse and flexible, and responsive to the needs of existing customers.

VI. ORDERING CLAUSES

15. Accordingly, pursuant to Sections 0.131(a), 0.331(a)(3), and 90.151 of the Commission's Rules, IT IS ORDERED THAT:

(1) The provisions of 47 C.F.R. §§ 90.631(e) and (f) are waived to allow PSI four years from the release date of this *Order* to construct its system and place it in operation;

(2) The loading requirements of 47 C.F.R. § 90.631(b) are waived in conjunction with the waiver of Sections 90.631(e) and (f);

(3) The waivers are granted either directly to PSI or to licensees that are network participants through the execution of management agreements, as the case may be;

(4) Thirty days after the adoption of this *Order*, PSI must submit to the Commission's Private Radio Bureau, Gettysburg, PA 17326, an implementation schedule that includes a specific construction date for each individual system included in its network. PSI will be required to comply with this implementation schedule and shall file reports quarterly showing the extent to which the authorized system has been implemented.

(5) Pursuant to the terms of this *Order*, PSI's waiver is conditioned on compliance with each of the construction deadlines set forth in its extended implementation schedule. Should PSI fail to satisfy any of these deadlines, the company will no longer have an extended implementation period and will be required to complete the construction of its entire system, and to place the entire system in operation, within one year of the missed date. Failure to comply with this one-year construction requirement will result in the automatic cancellation of all authorizations with facilities that have not been constructed and placed in operation.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller, Chief
Private Radio Bureau

[24] As a part of this *Order*, PSI is directed to submit its detailed extended implementation schedule to the Commission's Private Radio Bureau in Gettysburg, PA, within thirty days of the date of this *Order's* adoption.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-314

In the Matter of

Amendment of Section 73.202(b), RM-8142
Table of Allotments,
FM Broadcast Stations.
(Oliver, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 18, 1993; Released: July 7, 1993

By the Chief, Allocations Branch:

1. At the request of Humes Broadcasting Corporation (formerly Humes Broadcasters) ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 367 (1993), proposing the substitution of Channel 235B1 for Channel 235A at Oliver, Pennsylvania, and the modification of Station WASP-FM's (formerly Station WXAK) construction permit to specify the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 235B1 for Channel 235A at Oliver since it could provide the community with a wide coverage area FM service and enable Station WASP-FM to expand its service area. Channel 235B1 can be allotted to Oliver in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.6 kilometers (7.8 miles) east to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment has been received since Oliver is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As proposed, we will also modify Station WASP-FM's construction permit to specify operation on Channel 235B1 in lieu of Channel 235A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 23, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Oliver, Pennsylvania	235B1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Humes Broadcasting Corporation, for Station WASP-FM, Oliver, Pennsylvania, IS MODIFIED to specify operation on Channel 235B1, in lieu of Channel 235A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Humes Broadcasting Corporation, permittee of Station WASP-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 235B1 at Oliver are North Latitude 39-55-15 and West Longitude 79-34-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-184

In the Matter of

Amendment of Section 73.202(b), RM-8277
Table of Allotments,
FM Broadcast Stations.
(Norlina, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1993; Released: July 7, 1993

Comment Date: August 30, 1993
Reply Comment Date: September 14, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert Carver and Frank White, d/b/a Carver-White Broadcasting Company ("petitioner"), proposing the allotment of Channel 232A to Norlina, North Carolina, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 232A to Norlina since an interest has been expressed in providing the community with its first local aural transmission service. Channel 232A can be allotted to Norlina in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) north to avoid short-spacings to Stations WRQR, Channel 232A, Farmville, North Carolina, and WQDR, Channel 234C, Raleigh, North Carolina.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Norlina, North Carolina	--	232A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 30, 1993,** and reply comments on or before **September 14, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank White
Carver-White Broadcasting Company
P.O. Box 1487
Roanoke Rapids, North Carolina 27870
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 232A at Norlina are North Latitude 36-29-02 and West Longitude 78-11-23.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SUNSHINE CELLULAR,
Complainant,

v. File No. E-92-80

VANGUARD CELLULAR SYSTEMS,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 28, 1993; Released: July 7, 1993

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 5, 1992, Sunshine Cellular (Sunshine) filed the above-captioned formal complaint against Vanguard Cellular Systems (Vanguard) alleging that Vanguard has violated Sections 201(b) and 202(a) of the Communications Act, and Section 22.911 of the Commission's Rules, 47 U.S.C. §§ 201(b), 202(a), and 47 C.F.R. § 22.911(b), by refusing to enter a two-way reciprocal roaming agreement with Sunshine on terms and conditions requested by Sunshine. Vanguard denied the allegations and moved to dismiss the complaint. On June 25, 1993 Sunshine filed an "Agreed Motion to Withdraw Complaint and Associated Pleadings With Prejudice" stating that it no longer wishes to pursue the complaint.[1]

2. The parties have engaged in negotiations aimed at reaching a mutually satisfactory resolution of the matter in dispute. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Withdraw the Complaint and Associated Pleadings IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] Counsel for Sunshine represents that Counsel for Vanguard authorized him to state that Vanguard does not oppose the motion and likewise requests that all pleadings filed on its behalf be withdrawn.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Hiawathaland Cellular Limited Partnership — File Nos. 06205-CL-MP-92, 08754-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in market 492, Minnesota 11 (Goodhue)

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1993; Released: July 7, 1993

By the Acting Chief, Common Carrier Bureau:

1. On July 16, 1992, ACC/McCaw Cellular of Minneapolis (ACC) filed a joint pleading entitled "Petition to Deny and Petition for Reconsideration" against the captioned applications. The petition for reconsideration requests that the grant of the application (in file no. 08754)[1] be rescinded because the licensee's signal contours extend into the Minneapolis, Minnesota, Metropolitan Statistical Area (MSA). Hiawathaland Cellular Limited Partnership (Hiawathaland) filed an opposition.

2. The Chief, Mobile Services Division, dismissed by letter, the petition to deny. *See* Letter to C. Massey (June 23, 1993). We affirm the decision treating the pleading as separate requests and dismissing the petition to deny.[2] *See* Section 1.44(d) of the Commission's Rules, 47 C.F.R. § 1.44(d). Therefore, the only pending matter before us is the petition for reconsideration.

3. The petition for reconsideration is untimely. *See* Section 405 of the Communications Act, 47 U.S.C. § 405 (petitions for reconsideration must be filed within 30 days of public notice of the action). *See also* Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f). ACC had 30 days from May 16, 1991, to file the petition for reconsideration. Having failed to do so, the grant of file no. 08754 became a final action.

4. Accordingly, IT IS ORDERED that the Mobile Services Division's decision treating the joint pleading as a separate petition to deny and petition for reconsideration IS AFFIRMED and the petition for reconsideration filed by ACC/McCaw Cellular of Minneapolis, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[1] The application was granted on May 16, 1991.

[2] The "Petition to Deny and Petition for Reconsideration" was a defective pleading for violating Section 1.44(c) of the Commission's Rules, 47 C.F.R. § 1.44(c) (separate pleadings for different requests). However, Section 1.44(d) of the Rules makes return of the pleading discretionary.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 30, 1993

EXTENSION OF REPLY COMMENT PERIOD FOR INDUSTRY PROPOSALS ON UNLICENSED PCS SERVICES (GEN DOCKET NO. 90-314)

On May 18, 1993, the Commission requested comments in this proceeding on a Report and Recommendations from the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM), and a proposed Spectrum Etiquette from the Wireless Information Network Forum (WINForum). Comments on these documents were requested by June 21, 1993, and reply comments by July 6, 1993.

On June 23, 1993, the Commission received a request from WINForum to extend the reply comment deadline to July 20, 1993. WINForum states that, due to the number of substantive comments that were filed, this extension is necessary for it to give due consideration to the viewpoints of all interested parties.

In order to ensure as complete a record as possible in this proceeding, we believe that extending the reply comment deadline is appropriate. Accordingly, the reply comment deadline is extended to July 20, 1993.

For further information contact David Means at (301) 725-1585 ext. 206.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Amertel Electronics Corp.
Pico Rivera, California

NAL Acct. No. 215CG0058

Liability for Monetary Forfeiture

ORDER

Adopted: June 29, 1993; **Released: July 8, 1993**

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Amertel Electronics Corporation (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the July 16, 1992, Forfeiture Order issued by the Chicago FCC field office, finding Petitioner liable for a monetary forfeiture in the amount of $5,600 for violating Section 302 of the Communications Act of 1934, as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Rules, 47 C.F.R. § 2.803. Petitioner was cited for a violation resulting from its offer for sale of an uncertified model of a cordless telephone at a consumer electronic trade show. As explained below, we are affirming the finding of liability for the monetary forfeiture penalty.

2. The appropriate amount of the forfeiture is $5,600.

II. BACKGROUND

3. On May 28-31, 1992, an FCC inspector from the Chicago Field Office visited Petitioner's exhibit booth at the Summer Consumer Electronic Show held in Chicago, Illinois. There, Petitioner was displaying a "KT-618 Cordless Phone" lacking any FCC identification label or FCC certification. On July 16, 1992, the Chicago Office issued a Notice of Apparent Liability (NAL) to Amertel Electronics Corporation for violating the requirements of Section 302 of the Act and Section 2.803 of the Rules. These provisions establish the requirement that all radio frequency devices requiring Commission approval must be certified prior to use, or sale or offer for sale or lease.

4. By letter dated August 12, 1992, Amertel's Manager responded to the NAL. He contended that the Company has never sold, marketed or leased any uncertified devices and had no intention of doing so in the U.S.A. He also argued that there was no violation because the trade show was "international" and not solely geared to U.S. customers. The Company's manager also requested cancellation of the forfeiture because it readily displayed the disclaimer notice provided by the FCC inspector at the show.[1]

5. After reviewing Amertel's response, the Chicago office found it appropriate to mitigate the amount of the forfeiture to $5,600, and on August 20, 1992, issued the Forfeiture Order from which Amertel now requests reconsideration. In its petition, Amertel again argues that it markets its equipment primarily to customers outside the U.S., and would apply for FCC authorization if it found a U.S. buyer for its equipment. Petitioner also contends that the KT-618 uncertified device was in a "private (not open to the public) room in the booth" and was only shown to international buyers.

III. DISCUSSION AND CONCLUSION

6. Section 2.803 prohibits the marketing, including the offering for sale, displaying and advertising, of radio frequency devices that have not received FCC authorization. Although Commission rules exempt radiofrequency devices manufactured "solely for export" from this requirement, *see* 47 C.F.R. § 2.807, Petitioner has failed to submit any credible evidence or information on which to conclude that Petitioner was entitled to use this exemption. Indeed, the facts and circumstances of Petitioner's action indicate that Petitioner was engaged in marketing its device to the general public in the U.S. To avail itself of the exemption, Petitioner must show that the devices were manufactured solely for export. Petitioner has not carried this burden.[2]

7. For the reasons stated above, we are affirming the $5,600 monetary forfeiture assessed against Petitioner in NAL Acct. No. 215CG0058. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *see Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992)(*Policy Statement*), was taken into consideration. No further adjustments appear warranted.

IV. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration is DENIED. 47 C.F.R. § 1.106.

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[1] The notice contains specific language notifying potential customers that the device or equipment has not been approved by the FCC and may not be sold or leased, or offered for sale or lease until FCC approval has been obtained. *See* 47 C.F.R. §2.803.

[2] The Forfeiture Order does not address Petitioner's argument, made in response to the Notice of Apparent Liability, that its action in readily displaying the disclaimer notice somehow merits consideration. We address that argument now. We note that remedial action to correct a violation, although commendable, is not dispositive of the issue of liablity, and cannot nullify a forfeiture. *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

9. IT IS FURTHER ORDERED that Amertel Electronics Corporation shall submit payment of the $5,600 monetary forfeiture within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL number 215CG0058 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Amertel Electronics Corporation, 3653 San Gabriel River Parkway, Pico Rivera, CA 90660.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

DD & TT Enterprise	NAL Acct. No. 215LA0021
USA Co.	NAL Acct. No. 215CG0051
Bell, California	

ORDER

Adopted: June 29, 1993; **Released: July 8, 1993**

By the Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it two Petitions for Reconsideration filed by DD & TT Enterprise USA Co. (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's August 28, 1992, Forfeiture Order finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Rules, 47 C.F.R. § 2.803, and its September 2, 1992, Forfeiture Order in the amount of $700 for violation of Section 302 of the Act and Section 2.925(a) of the Rules, 47 C.F.R. § 2.925(a). Because these two Petitions involve the same party, as well as similar issues and arguments, we are consolidating these two Petitions. *See* 47 C.F.R. § 1.227(a)(1). As explained below, we are affirming the finding of liability for the monetary forfeiture penalties.

2. The appropriate amount of the forfeitures are $7,700 ($7,000 for NAL Acct. No. 215LA0021 and $700 for NAL Acct. No. 215CG0051).

II. BACKGROUND

3. FCC inspectors from the Los Angeles field office visited Petitioner's display at the Fall COMDEX show on October 23, 1991, which was held in Las Vegas, Nevada. At this trade show, the investigators observed that Petitioner was exhibiting a 386 40 MHz personal computer, model No. 80386, lacking FCC certification.

4. At a similar trade show held on April 6-9, 1992, the Spring '92 COMDEX, FCC investigators from the Chicago field office found DD & TT exhibiting equipment which was not in compliance with Commission Rules. FCC investigators inspected a "Super VGA (Multi I/O Controller, Model DT-9030" which lacked a label indicating its FCC identifier. A subsequent search of Commission records disclosed that a grant of authorization for the device had been issued to the Win Win Electronic Co. Ltd. under the FCC identifier "JQMDT-9030."

5. On July 20 and 27, 1992, the Chicago and Los Angeles Offices, respectively, issued Notices of Apparent Liability (NAL) to Petitioner for violating Section 302 of the Communications Act and Sections 2.925(a) and 2.803 of the Commission's Rules, by marketing computers which lacked a label or FCC identifying information, and for marketing a device which lacked any grant of authorization from the FCC (NALs No. 215CG0051 and 215LA0021). Petitioner responded on August 18, 1992, to the NAL issued by the Chicago Office, and on August 19, 1992, to the NAL issued by the LA Office. In both responses, Petitioner's president, Tiger Lee, acknowledged the violations and requested that no forfeitures be issued because the violations were unintentional --not willful-- and attributable to ignorance of the legal requirements. Upon review of the responses, the Los Angeles and Chicago Offices issued Forfeiture Orders to DD & TT on August 28, 1992, and on September 2, 1992, respectively.

6. In a September 22, 1992, letter from David Wise, DD & TT's Director of Sales and Marketing, Petitioner argued that it should not be subject to a monetary forfeiture penalty because the violations were inadvertent, and were promptly corrected when they were brought to the company's attention by FCC inspectors.

III. DISCUSSION AND CONCLUSION

7. We note that this response presented no new arguments or information from what was provided by DD & TT's President. Petitioner's argument reflects a misunderstanding of the term "willful". In order to establish the willfulness of an act, the Commission only needs to show that the action at issue was voluntary, not accidental.[1] Section 2.803 of the FCC's Rules prohibits the marketing; including the offering for sale, displaying and advertising; of radio frequency devices that have not received FCC authorization. Personal computers must be authorized by the FCC. 47 C.F.R. § 15.3(i), (r),(s) and 15.101. Additionally, an FCC authorized device must have a label which includes an FCC identifier, reflecting that the device has been authorized by the FCC. 47 C.F.R. § 2.925, 2.926 and 15.19.

8. At both the Fall '91 and Spring '92 COMDEX computer trade shows, Petitioner was marketing devices which were either unauthorized (Fall COMDEX) or unlabeled (both the equipment from the Fall and the Spring COMDEX shows). Although Petitioner's representatives did take prompt corrective action, this alone does not warrant dismissal or mitigation of the forfeiture. *Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700(1966).

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[1] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b)(*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991)), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ....

IV. CONCLUSION

9. For the reasons stated above, we are affirming the amount of the monetary forfeitures assessed against Petitioner in NAL Acct. No. 215LA0021 (for $7,000) and in NAL Acct. No. 215CG51 (for $700). In determining the amount of forfeiture, the Commissions policy regarding forfeiture adjustments, *see Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on reconsideration,* 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992)(*Policy Statement*), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

10. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by DD & TT is DENIED. 47 C.F.R. § 1.106.

11. IT IS FURTHER ORDERED that DD & TT shall submit payment of the $7,700 monetary forfeitures within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place NAL numbers 215LA0021 and 215CG0051 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Tiger Lee, President, DD & TT Enterprises, 7FL., No. 8, Lane 235, Pao-Chiao Rd., Hsin Tien City, Taipei, Taiwan, R.O.C., and to David Wise, 5680 Rickenbacker Rd., Bell, CA. 90201.

13. If the $7,700 monetary forfeiture penalty is not paid within 30 days, the forfeiture cases may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. § 504(a).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 29, 1993

Released: July 7, 1993

CERTIFIED MAIL NO. P 295 670 595
RETURN RECEIPT REQUESTED
Sunwell International Corporation
1923 Hartog Drive
San Jose, California 95131

Stop Code 1500E3

Re: Notice of Forfeiture
issued to Sunwell
International Corporation
on December 14, 1990.
3153202-91-018

Attention: Grace Lee, President

Dear Sunwell International Corporation:

This letter is in response to your request for reduction of the monetary forfeiture due to your inability to pay the forfeiture. The penalty was imposed by the Federal Communications Commission's (FCC) Norfolk Office in a Notice of Forfeiture issued to Sunwell International on December 14, 1990. The Forfeiture Notice was issued because Sunwell displayed a CCW Model 286 16 MHz personal computer at COMDEX in Las Vegas, Nevada, on November 14, 1990, and this computer had not been authorized by the FCC. Section 2.803 of the FCC's rules prohibits the marketing of personal computers that lack FCC authorization. 47 C.F.R. Section 2.803.

Sunwell requested reconsideration of the Notice of Forfeiture on December 28, 1990. The FCC in Washington, D.C., affirmed the penalty in a letter dated May 22, 1991, but provided Sunwell with the opportunity to document its claim of inability to pay by providing copies of its Federal income tax returns for the last three years. Sunwell responded by letter dated June 18, 1991, that it had attached its 1989 tax return and offered to provide its 1990 tax return when it was prepared. However, no return for 1989 was provided. On August 16, 1991, the FCC requested the 1989 and 1990 tax returns. Sunwell sent its 1989 tax return on September 10, 1991, and stated that its 1990 tax return would be provided when completed. This return has not been received. On April 7, 1993, the FCC wrote Sunwell requesting this tax return within 30 days, as well as a copy of Sunwell's 1991 tax return and, if prepared, its 1992 tax return. Sunwell has not responded.

Therefore, please submit the $2,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 3153202-91-018 on the check and send it to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Monetary forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for collection through a civil suit as provided in Section 504(a) of the Communications Act of 1934. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 29, 1993

Released: July 7, 1993

Mr. Steven Jordan
1765 Koehn Road 6
Sedro Woolley, WA 98284

Re: NAL No. 215FE0154

Dear Mr. Jordan:

This is in response to your correspondence dated September 8, 1992, concerning the above referenced NAL account and the subsequent Forfeiture Order dated August 27, 1992.

After careful consideration of all the facts; the limited nature of the transmissions, lack of a history of violation, your recent acquisition of the boat, and your ability to pay, we are reducing the forfeiture amount to $50.00. Please remit this amount within thirty (30) days of the date of this letter. The check or money order should be made payable to the Federal Communications Commission and marked NAL/Acct. No. 215FE0154. Payment should be mailed to:

Federal Communications Commission
PO Box 73482
Chicago, Illinois 60673-7482

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-201

In the Matter of

Amendment of Section 73.202(b)	RM-8213
Table of Allotments,	RM-8252
FM Broadcast Stations.	
(Walla Walla and Waitsburg,	
Washington)	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 24, 1993; Released: July 8, 1993

Comment Date: August 30, 1993
Reply Comment Date: September 14, 1993

By the Chief, Allocations Branch:

1. The Commission has before it two mutually exclusive petitions for rule making. The first petition was filed by Walla Walla Christian Broadcasters ("WWCB"), proposing the allotment of Channels 256A and 270A at Walla Walla, Washington, as the community's fifth and sixth local commercial FM transmission services.[1] The second petition was filed by Brett E. Miller ("Miller") proposing the allotment of Channel 270C3 at Waitsburg, Washington, as its first local aural transmission service.[2] Both parties expressed their intention to apply for the channels, if allotted to their respective communities.

2. The proposals are mutually exclusive because the distance between Channel 270A at Walla Walla and Channel 270C3 at Waitsburg is less than the 142 kilometers (88.3 miles) required for co-channel allotments. Therefore, the channel can be allotted to only one of the communities in compliance with the minimum distance separation requirements of Section 73.202 of the Commission's Rules. Our engineering analysis has determined that both Channels 256A and 270A can be allotted to Walla Walla in compliance with the Commission's minimum distance separation requirements at the same reference coordinates without the imposition of site a restriction.[3] Additionally, Channel 270C3 can be allotted to Waitsburg with a site restriction of 2.2 kilometers (1.4 miles) southwest to avoid a short-spacing to Station KTSL, Channel 270C3, Medical Lake, Washington.[4] Since Waitsburg is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested. We shall provide the proponents an opportunity to demonstrate in comments which community should receive the requested allotments. In this regard the parties should be guided by the allotment criteria set forth in *Revision of the FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

3. In view of the above, we believe it would serve the public interest to solicit comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
	OPTION I	
Walla Walla, Washington	227C1, 239C, 246C, 264C3[5]	227C1, 239C, 246C, 256A 264C3, 270A
	OPTION II	
Waitsburg, Washington	--	270C3

[1] We note that in markets with fewer than 15 stations the "less than 50 percent" standard permits ownership of up to three stations, provided all three stations are not of the same service. However, pursuant to the new local rules, no more than two of those three stations may be in the same service. Accordingly, since Walla Walla has less than 15 local services, WWCB is eligible to apply for two FM channels. *See Revision of Radio Rules and Policies (Memorandum Opinion and Order)*, 7 FCC Rcd 6387 (1992).

[2] Although Miller's request indicates that the original copy of his proposal was signed, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any documentation filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Miller is requested to rectify this omission in his comments.

[3] The coordinates for Channels 256A and 270A at Walla Walla are North Latitude 46-04-12 and West Longitude 118-19-48.

[4] The coordinates for Channel 270C3 at Waitsburg are North Latitude 46-15-10 and West Longitude 118-09-56.

[5] We note that the FM Table of Allotments erroneously reflects Channel 265A at Walla Walla. In *Report and Order*, MM Docket No. 87-90, 2 FCC Rcd 6280 (1987), an upgrade was granted to Station KHSS(FM) to substitute Channel 264C2 for Channel 265A at Walla Walla. Accordingly, Channel 265A should have been removed from the FM Table of Allotments. Station KHSS(FM) subsequently filed an application for and was granted a construction permit for a Class C3 facility which is reflected in the Table. Therefore, we will make the editorial change of removing Channel 265A in the context of this proceeding. Since the correction is editorial in nature, a public notice and comment proceeding is unnecessary. *See* 5 USC 553(b)(A) and (B).

	OPTION III	
Walla Walla, Washington	227C1, 239C 246C, 264C3	227C1, 239C 246C, 256A, 264C3
Waitsburg, Washington	–	270C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 30, 1993,** and reply comments on or before **September 14, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultants, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W.,
Suite 200
Washington, D.C. 20006
(Counsel for WWCB)

Brett E. Miller
11608 Blossomwood Court
Moorpark,
California 93021
(Petitioner for
Waitsburg, WA)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504* and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-3

In the Matter of

Amendment of Section 73.202(b),	RM-7874
Table of Allotments,	RM-7958
FM Broadcast Stations.	
(Prineville and Sisters, Oregon)	

ORDER DENYING MOTION TO STRIKE

Adopted: June 24, 1993; Released: July 8, 1993

By the Chief, Policy and Rules Division:

1. At the request of Schuyler H. Martin ("Martin"), licensee of Station KPXA, Sisters, Oregon, the Commission has before it a motion to strike filed in response to the *Report and Order* in this proceeding, 7 FCC Rcd 6516 (1992). An opposition to the motion to strike was jointly filed by Central Oregon Broadcasting, Inc., Redmond Broadcast Group, Inc., Highlakes Broadcasting Company, JJP Broadcasting, Inc., Oak Broadcasting, Inc., Sequoia Communications, and The Confederated Tribes of the Warm Springs Reservation of Oregon ("the Commenters").[1] Martin filed a reply.

2. *Background.* The *Report and Order* in this proceeding substituted Channel 281C1 for Channel 281A at Sisters and modified the construction permit for Station KPXA to specify the higher class channel, as requested by Martin. A mutually exclusive proposal seeking the allotment of Channel 284A to Prineville, Oregon, was withdrawn by its proponent, Danjon, Inc. The Commenters, who had filed a timely opposition to the proposals, subsequently filed a petition for reconsideration of the *Report and Order*.[2]

3. *Motion to Strike.* Martin's motion to strike was filed in response to the Commenters' petition for reconsideration. He notes that under Section 1.429(d) of the Commission's Rules, a petition for reconsideration must be filed within thirty days from the date of public notice of such action as that date is defined in Section 1.4(b) of the Commission's Rules. That section establishes computation of time rules for documents in notice and comment rule making proceedings of general applicability and of particular applicability. Section 1.4(b)(3) states that for rule makings of particular applicability, if the rule making document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice commences on the date of Federal Register publication; if the decision fails to specify Federal Register publication, the date of public notice commences on the release date, even if the document is published in the Federal Register. On the other hand, Section 1.4(b)(1) states that the date of public notice for documents in all other types of notice and comment rule making proceedings is the date of publication of the document in the Federal Register.

4. Martin claims that this proceeding is a rule making of particular applicability within the meaning of Section 1.4(b)(3) of the Commission's Rules, as the *Report and Order* did not allot any new channels which would be made available for application by interested members of the public. He notes that the *Report and Order* did not expressly state that the document was to be published in the Federal Register, and therefore the date of public notice commenced on October 7, 1992, instead of on October 14, 1992, the date of Federal Register publication. He notes that Section 405(a) of the Communications Act of 1934, as amended, specifies that any petition for reconsideration must be filed within thirty days of the date of public notice of that action. Therefore, he claims that since the Commenters' petition for reconsideration was filed on November 13, 1992, more than thirty days after the October 7, 1992, date of public notice, it is untimely and should be dismissed without consideration as to the merits.

5. In response, the Commenters argue that the *Report and Order* is a rule making of general applicability and filing dates are therefore governed by Section 1.4(b)(1) of the Commission's Rules. They argue that courts and the Commission have held that rule makings of particular

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[1] The Commenters are licensees of various radio broadcast stations licensed to Bend, Redmond, Prineville and Warm Springs, Oregon.

[2] Public notice of the Commenters' petition for reconsideration was given at 57 Fed. Reg. 57066 (December 2, 1992).

Martin filed a petition for reconsideration of the public notice of the Commenters' petition for reconsideration, to which the Commenters filed an opposition. Martin argues that the Commenters' petition for reconsideration was untimely filed, and therefore should not have been placed on public notice. Martin's petition for reconsideration is unacceptable for consideration, as it constitutes an attempt to seek reconsideration of an interlocutory action. *See* Commission Rule 1.106(a). In any event, we need not address Martin's petition for reconsideration, as we determine in this *Order* that the Commenters' petition for reconsideration was, in fact, timely filed. Therefore, we will dismiss Martin's petition for reconsideration, the Commenters' opposition and Martin's reply.

Martin also filed a petition for declaratory ruling that Section 1.420(f) of the Commission's Rules, which states that the filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition, is inapplicable in this case because the petition for reconsideration was untimely filed. The Commenters filed an opposition to the petition for declaratory ruling. It is unnecessary to address the petition for declaratory ruling and the opposition thereto, as the petition is premised on the assumption that the Commenters' petition for reconsideration was untimely filed.

We will resolve the issues raised in the Commenters' petition for reconsideration in a separate *Memorandum Opinion and Order*.

applicability are those governing matters such as tariffs and schedules of rates, citing *ABC v. FCC*, 682 F.2d 25 (2d Cir. 1982), and *Declaratory Ruling*, 51 Fed. Reg. 23059 (1986). They also argue that the Commission has consistently held that Federal Register publication of a FM allotment *Report and Order* initiates the reconsideration filing deadline, citing to various Commission staff actions. The Commenters maintain that allotment proceedings are of interest and applicable to the public at large, not merely to the proponent, whether the proposal is for a new allotment or a channel upgrade. They note that even if no competing expression of interest is filed, a party may want to file a counterproposal, comments or a petition for reconsideration. Furthermore, they also argue that an allotment proceeding may have a preclusive effect on all users of broadcast spectrum within a considerable radius of the allotment.[3]

6. In reply, Martin claims that *ABC v. FCC* "made clear that the term 'rule makings of particular applicability' encompasses far more than merely proceedings to establish a common carrier's rate of return or its schedule of tariffed rates," and that the term applies to the "multitude" of notice and comment rule making proceedings which do not so directly affect preexisting legal rights or obligations as to require Federal Register publication. He notes that in another context, the Commission has stated that proceedings to amend the Table of Allotments do not involve substantial impact on a significant number of entities, citing *Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 84 FCC 2d 791, 792 (1981), and characterizes that proceeding as establishing that channel allotment rule making proceedings are rule makings of particular applicability. Martin argues that the fact that the allotment of a new channel may have a preclusive effect on other users of the spectrum is not sufficient to convert a proceeding to a rule making of general applicability. Finally, he characterizes the various Commission staff cases cited by the Commenters in support of its position as either distinguishable from the instant situation or inapposite to this proceeding.

7. *Discussion.* Martin argues that this broadcast allotment proceeding constitutes a rulemaking of particular, rather than general, applicability, that the timeliness of the petition for reconsideration is therefore covered by 47 CFR 1.4(b)(3) rather than 47 CFR 1.4(b)(1), and that the petition was late-filed under Section 1.4(b)(3). We disagree.

8. Rulemakings of particular applicability under the Administrative Procedure Act and our computation of time rules are those rulemaking proceedings addressed to named persons. In such proceedings, there is no requirement to publish either the proposed or the final rule in the Federal Register, and personal service on the particular parties subject to the rule is sufficient. *See* 5 USC 552(a)(1)(D); 553(b); *ABC v. FCC*, 682 F.2d 24, 31-32 (2d Cir. 1982); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 630 n.17 (D.C. Cir. 1966); *Practice and Procedure; Clarification of Date of Public Notice*, 51 Fed. Reg. 23059, 23060 (1986); Attorney General's Manual on the Administrative Procedure Act 22, 28 (1947). Thus, Section 1.4(b)(3) was intended to address potential confusion that might arise concerning the date of public notice in such proceedings because, although classified as rulemaking, the Commission in such proceedings may dispense entirely with Federal Register publication. *See* 47 CFR 1.4(b)(3) ("For rulemakings of particular applicability *if* the rulemaking document is to be published in the Federal Register") (emphasis added).

9. Broadcast allotment proceedings do not fall within this category. They are not rules that apply to named persons. Indeed, it would be impossible to determine in advance all the stations or persons potentially affected by a broadcast allotment proceeding and to serve such parties personally with the proposed or final rule.[4] Federal Register publication of both the *Notice of Proposed Rule Making* and the *Report and Order* in broadcast allotment proceedings is thus required under Sections 552(a)(1)(D) and 553(b) of the Administrative Procedure Act, and that is our consistent practice. We therefore conclude that, for purposes of the notice and comment and publication requirements of the Administrative Procedure Act and hence for our computation of time rules, broadcast allotment proceedings are rulemakings of general applicability. The petition for reconsideration filed by the Commenters was thus timely filed under 47 CFR 1.4(b)(1).

10. Accordingly, IT IS ORDERED, That the Motion to Strike filed by Schuyler H. Martin IS DENIED.

11. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[3] The Commenters also argue that if the Commission were to change its "consistent stance" and hold that Section 1.4(b)(3), rather than Section 1.4(b)(1), is controlling in this proceeding, the new policy could not be enforced in this case. We will not address this issue, given our resolution herein.

[4] For example, when the Bureau issued its *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 501 (1992), in response to a petition for rule making filed by Danjon, Inc., regarding Prineville, Oregon, there is no way it could have anticipated that Martin would file a counterproposal involving Sisters and have served the *Notice of Proposed Rule Making* on Martin.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-20

In the Matter of

Amendment of Section 73.202(b), RM-8177
Table of Allotments,
FM Broadcast Stations.
(Cheyenne, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 24, 1993; Released: July 7, 1993

By the Chief, Allocations Branch:

1. At the request of Jackalope Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 963 (1993), proposing the allotment of Channel 285A at Cheyenne, Wyoming, as its fourth local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. KMUS, Inc., licensee of Station KMUS(FM), Burns, Wyoming, and Blue Sky Broadcasting, Inc., licensee of Station KLEN(FM), Cheyenne, Wyoming ("respondents"), filed joint reply comments.[1]

2. In their reply comments, respondents argue that Cheyenne has an already over-saturated radio market and a new allotment would cause economic harm to existing stations. Acknowledging that in the past it has been the Commission's policy to encourage the addition of new allotments wherever technically feasible, without regard to impact on existing facilities, respondents contend that technical feasibility should no longer be the sole consideration in making new allotments. Respondents assert that this policy has caused ruinous competition among small and medium-size radio markets. In light of this experience, respondents argue that the Commission should also consider the economic impact of new allotments on existing stations and their ability to continue to provide public service. Respondents claim that Commission has recently recognized the economic difficulties facing radio broadcasters.[2] Respondents conclude that "[t]he Commission's recognition of and reliance upon the economic distress of the radio industry in the radio multiple ownership proceeding, and the increasingly frequent citations to the economic hardships facing stations generally, represent a dramatic change in Commission policy regarding the establishment of new stations." Respondents assert that the Commission has changed from its prior policy that mandated the establishment of as many new stations as were technically feasible regardless of the economic impact. Therefore, considering the adverse impact a new FM station would have on the economic viability of existing radio stations at Cheyenne, respondents urge that petitioner's proposal be denied.

3. We reject respondents' argument that the Commission's recognition of and reliance upon the economic distress and hardships in the radio multiple ownership rulemaking proceeding represent a "dramatic change" in Commission policy regarding new allotments. Although the Commission recognizes the increased competition and economic hardships among stations in radio markets, respondents' reliance on the radio multiple ownership rulemaking proceeding as constituting a change in policy on the impact of new allotments on existing stations is misplaced. It remains the Commission's policy not to address the potential economic impact of new allotments on existing stations. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *aff'd* 4 FCC Rcd 2276 (1989). Accordingly, respondents' request to deny petitioner's proposal solely because of economic impact on existing stations is denied.

4. We believe the public interest would be served by the allotment of Channel 285A at Cheyenne, Wyoming, since it would provide the community with its fourth local FM transmission service. An engineering analysis has determined that Channel 285A can be allotted to Cheyenne in compliance with the Commission's minimum distance separation requirements at city reference coordinates without the imposition of a site restriction.[3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 23, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cheyenne, Wyoming	250C, 264C1, 285A, 292C3

[1] After the reply comment period closed, petitioner filed a motion for leave to file supplemental comments opposing the acceptance of respondents' joint reply comments. Respondents filed a joint response to motion for leave to file supplemental comments and a joint opposition to motion to strike denying petitioner's assertion that their reply comments were late-filed and urging that they be accepted. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comments periods unless specifically requested, as set forth in the *Notice*. Therefore, the pleadings will not be accepted and discussed herein. Furthermore, it is not necessary to discuss these pleadings in light of our resolution of the issues raised by respondents.

[2] *See Revision of Radio Rules and Policies (Report and Order) ("R&O")*, MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part*, 7 FCC Rcd 6387 (1992). Respondents note that in the *R&O*, the Commission relied in substantial part on economic difficulties of the radio industry to conclude that it would be appropriate to raise the national radio ownership limit and to relax the radio duopoly rule.

[3] The coordinates for Channel 285A at Cheyenne are North Latitude 41-08-18 and West Longitude 104-48-48.

6. The window period for filing applications will open on **August 24, 1993,** and close on **September 23, 1993**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau. (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-172

In the Matter of

Amendment of Section 73.202(b), RM-6894
Table of Allotments,
FM Broadcast Stations.
(Castle Rock, Colorado Springs,
Frisco and Salida, Colorado;
Raton, New Mexico)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 25, 1993; Released: July 8, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order*, 7 FCC Rcd 7668 (1992), in this proceeding, filed on behalf of Colorado Springs Radio Broadcasting ("CSRB"), licensee of Station KILO(FM), Colorado Springs, Colorado.[1] The *Report and Order* granted service improvements to stations located at Castle Rock and Salida, Colorado, and Raton, New Mexico. To accommodate these improvements, Stations KILO(FM), Colorado Springs, Colorado, and KYSL(FM), Frisco, Colorado, were required to change channels. Century Broadcasting ("Century"), the licensee of Station KYBG, Castle Rock, Colorado and the proponent of the service improvements to Castle Rock and Salida, Colorado, filed an Opposition to the Petition for Reconsideration. For reasons discussed below, we deny the Petition for Reconsideration.

2. *Background.* The Commission initiated this proceeding by issuing a *Notice of Proposed Rule Making* (*"Notice"*), 4 FCC Rcd 5357 (1989), proposing to substitute Class C3 stations for Class A stations in 149 communities. One proposal sought to upgrade Station KRTN(FM) by substituting Channel 232C3 for Channel 232A at Raton, New Mexico. In response to that *Notice*, Century filed a mutually exclusive counterproposal which proposed the substitution of Channel 229C2 in lieu of Channel 232C3 for Channel 232A, Station KRTN(FM), Raton. Century also proposed the substitution of Channel 221C2 for its Channel 221A, Station KYBG(FM) at Castle Rock, Colorado; and the substitution of Channel 222C3 for Channel 221A, Station KVRH(FM) at Salida, Colorado. Century requested that the authorizations of the respective stations be amended to indicate operation on the newly assigned channels. To accommodate these service improvements, Century requested that Channel 230A be substituted for Channel 221A at Frisco, Colorado; that Channel 232C be substituted for Channel 230C at Colorado Springs, Colorado; and that the authorizations of Stations KYSL(FM) and KILO(FM), respectively, be amended to specify operations on the new channels.

3. Century indicated in its counterproposal that it had reached an agreement with Stations KVRH(FM) and KRTN(FM) regarding the proposed change in channels as well as amounts for reimbursement for the changes, pursuant to Commission policy.[2] Because Century had not reached agreement with KYSL(FM), Frisco, or KILO(FM), Colorado Springs, with respect to the necessary channel substitutions, the Commission issued *Orders to Show Cause*, 7 FCC Rcd 2967 (1992), to both of the affected stations. CSRB and Krystal Broadcasting ("Krystal"), licensee of Station KYSL(FM), filed joint comments opposing the counterpropsal and subsequently filed separate objections in response to the *Orders to Show Cause*. Both CSRB and Krystal alleged that the counterpropsal violates the "two substitution policy" established in *Columbus, Central City, Crookston, Kearney, Lexington, McCook and Valentine, Nebraska, Hill City, Kansas*, MM Docket 85-247, 59 RR 2d 1185 (1986) (hereinafter *"Columbus"*). Specifically, CSRB and Krystal argued that the *Columbus* policy prohibits the substitution of more than two channels to achieve a proposed change to the FM Table of Allotments, while Century proposed the substitution of four channels. They also argued that such a change in frequency would have severe adverse impact upon their operations and would be harmful to their economic development and continued viability. The *Report and Order* dismissed this argument, stating that the counterproposal did not violate the *Columbus* policy because the counterproposal involved the substitution of only two channels which had not previously agreed to such a change. Additionally, the *Report and Order* found that neither CSRB or Krystal had raised substantial or material questions of fact which would require a hearing on the proposed modification to their facilities.

4. CSRB's petition for reconsideration challenges the determination in the *Report and Order* that the grant of Century's proposal was consistent with the Commission's two substitution policy as established in *Columbus*. The Commission stated in *Columbus* that "absent special factors involving significant public interest benefit, or an assurance of agreement among affected stations to the proposal in advance of filing the petition, the staff has been instructed not to entertain proposals for changes in the FM Table of Allotments which involve more than two other substitutions of channels occupied by existing FM or TV stations." CSRB argues that the Commission's requirement for special factors involving significant public interest benefit should be interpreted to require a "compelling showing" by the petitioner equivalent to that required in a request for waiver of the Commission's minimum distance separation requirements. CSRB points to the Commission's reference in the *Columbus* decision of service to unserved areas or resolution of major technical problems as examples of the type of special showing which should be required prior to the consideration of a proposal which involves more than two channel substitu-

[1] Public Notice of CSRB's petition for reconsideration was given at 58 Fed. Reg. 4996, January 19, 1993.
[2] *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

tions. CSRB argues that because Century did not make a showing of "significant public interest benefit" or obtain the agreement of either it or Krystal in advance of filing its proposal, the petition should not have been accepted and should not have been granted.

5. *Discussion.* We do not agree with CSRB that our actions in the instant proceeding are contrary to the Commission's instructions in *Columbus*. The *Columbus* decision involved a proposal for one station upgrade which required substitutions for five existing stations and one vacant allotment.[3] The Commission took the opportunity presented by the facts of the case to express its concerns relating to proposals which involve multiple channel substitutions. The Commission noted that any proposal involving a channel substitution for an operating station requires the benefitting party to reimburse the affected station pursuant to guidelines established in *Circleville, Ohio*, 8 FCC 2d 159 (1967). Such proposals require agreement between the parties for the appropriate amount of reimbursement relating to each substitution. The proponent in *Columbus* had not obtained the consent of or reached agreement with any of the five stations which would have been affected by the proposal. The Commission was concerned that failure to reach agreement in advance could result in either the delay or preclusion of the proposed service improvement. In addition, the Commission was concerned that multiple channel substitutions which were not well executed could result in confusion for the listening public and also cause economic harm to the affected stations. For these reasons the Commission stated that "absent special factors involving significant public interest benefits, *or* an assurance of agreement among affected stations" the staff should not accept petitions which "involve more than two *other* substitutions of channels occupied by existing FM or TV stations."[4] (emphasis added) The decision to continue to routinely process petitions involving one or two channel substitutions was justified based on the Commission's experience that "proposals involving either one or two other channels substitutions have normally been successfully implemented."[5] Therefore it was determined that a service improvement for only one station did not present sufficient public interest benefits to warrant disruption to five operating stations. However, the Commission did not foreclose the ability of the staff to consider future petitions which proposed more than two channel substitutions, but instead indicated that we could not do so in the absence of special factors involving significant public interest benefits or the agreement of the affected stations.

6. We believe the instant proposal is distinguishable from that discussed by the Commission in *Columbus*. Century's prior agreement for appropriate amounts of reimbursement with all but two affected stations fulfills that aspect of the *Columbus* test restricting proposals to those involving no more than two channel substitutions. The Commission's staff has consistently applied the *Columbus* policy to indicate that we will not accept petitions which involve more than two channel substitutions for which consent has not been received,[6] and to accept petitions where, as here, all but two parties have consented.[7] To find a contrary result would indeed be against the public interest in that it could deny service improvements to any number of stations who have agreed among themselves to promote service improvements which represent a more efficient use of spectrum, without causing undue disruption of service. Indeed, to require that all parties reach agreement in advance could permit a licensee or permittee to preclude a number of channel substitutions that ultimately would provide new service to a large population. Such a result, we believe, would be contrary to the public interest.

7. The Commission has also consistently held that service improvements are in the public interest. Indeed, Century's counterproposal was occasioned by the Commission's decision to permit Class C3 channel upgrades as expeditiously as possible.[8] The counterproposal filed by Century was in response to the *Notice* to improve service to KRTN(FM), Raton. Century's counterproposal was superior in so far as it proposed a Class C2 facility rather than a Class C3, representing a greater service improvement to that community. In addition, Century's counterproposal provided for additional service improvements which the Commission would not have proposed on its own motion, both for its own station as well as KVRH(FM), Salida. Therefore, we believe, based on the service improvements to be provided to three communities in Colorado and New Mexico that such action is in the public interest and is not outweighed by the disruption to two existing stations. Furthermore, we note that the stations seeking upgrades could have filed separate counterproposals, with each separate counterpropsal referring to the interrelationship with the other counterproposals. While this would have avoided the two substitution prohibition, the filing of separate counterproposals would constitute duplicative efforts and an inefficient use of both private and Commission resources.

8. We now expect Century, CSRB and Krystal to negotiate in good faith for the reasonable expenses involved with the necessary channel substitutions.[9] While recognizing that changing a channel may cause temporary disruption to an existing station, the Commission has stated that such disruption does not override the public interest benefit of providing additional service to the public.[10] In addition, as we have held on numerous occasions, the substitution of an existing station's channel at one

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[3] The proposal filed in *Columbus* was ultimately dismissed for failure by the petitioner to file a continuing expression of interest and not based upon the request for multiple channel substitutions. *See Columbus*, 59 RR 2d 1185 (1986).

[4] *Id.*, 1185.

[5] *Id.*

[6] *See Kaukauna and Cleveland, Wisconsin*, 6 FCC Rcd 7142 (1991).

[7] *See Othello, East Wenachee and Cashmere, Washington and Wallace, Idaho*, 6 FCC Rcd 6476 (1991), *Milan, Metter, Swainsboro and Wrens, Georgia*, 6 FCC Rcd 5793 (1991), *Dyersburg, Tennessee, De Witt, Heber Springs, Hoxie, Jonesboro and Newport, Arkansas, First Report and Order*, 5 FCC Rcd 2579 (1990), *Second Report and Order*, 7 FCC Rcd 60 (1992).

[8] *See Amendment of the Commission's Rules Regarding Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114 (1986).

[9] *Circleville, Ohio*, 8 FCC 2d 159 (1967).

[10] In any event, any disruption to CSRB is minimized, as CSRB need not change channel immediately. As the Commission has stated, "it is generally not necessary for the change to take place until utilization of the existing frequency actually prevents [the

community serves the public interest where the substitution permits the provision of a new or expanded service at another community.[11]

9. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by Colorado Springs Radio Broadcasting IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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new channel] from inaugurating service." *See, e.g. Broken Arrow, Oklahoma, et al.*, 3 FCC Rcd 6508 (1988) and cases cited therein. With respect to the concern regarding the disruption to the economic well-being of the stations, the Commission determined that neither CSRB or Krystal had raised a substantial or material question of fact relating to the change in frequency. CSRB did not raise this issue in their petition for reconsideration, so it will not be addressed further.

[11] *Churchville and Luray, Virginia*, MM Docket 89-95, *recon. denied*, 6 FCC Rcd 1313 (1991), *Milan, Metter, Swainsboro and Wrens, Georgia*, 6 FCC Rcd 5793 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-115

In the Matter of

Policies and Rules Concerning
Local Exchange Carrier Validation
and Billing Information for Joint
Use Calling Cards

SECOND REPORT AND ORDER

Adopted: May 13, 1993; **Released: June 9, 1993**

By the Commission:

TABLE OF CONTENTS

	Paragraph No.
I. INTRODUCTION AND BACKGROUND	1
II. DISCUSSION	5
A. Non-discriminatory Access to BNA	5
1. Jurisdiction	5
2. Means of Access to BNA	21
B. Privacy Concerns	25
1. Background	25
2. Expectations of Privacy	27
3. Limitations on Parties to Whom BNA May Be Disclosed	29
4. Uses of BNA	32
5. Bulk Availability	34
6. Prior Authorization	38
7. Preemption of State Regulation	41
III. CONCLUSION	42
IV. ORDERING CLAUSES	43

Appendix A - List of Commenters

Appendix B - Amendments to the Code of Federal Regulations

Appendix C - Regulation of BNA at State Level

I. INTRODUCTION AND BACKGROUND

1. In this Second Report and Order, we require the local exchange carriers (LECs) to provide to interstate common carriers non-discriminatory access to the billing name and address (BNA) of LEC subscribers who use a LEC calling card or authorize collect[1] and third party calls[2] to pay for a carrier's services. Access to BNA will enable interstate service providers[3] to seek payment for their services directly from the LEC customer. We also amend Part 69 of our rules to establish the access rate elements for the LECs' provision of BNA access service and establish certain requirements regarding the release and use of BNA to protect customer privacy.

2. In May 1992, the Commission issued an order in this docket[4] requiring all LECs to provide non-discriminatory access to LEC joint use card[5] validation data,[6] and to LEC screening data.[7] In the *Validation Order*, the Commission stated that BNA is essential to make validation service of any practical value to those IXCs who do not have billing and collection agreements with the LECs.[8] Although the Commission had proposed in the *Validation Notice*,[9] to require the LECs to provide non-discriminatory access to BNA, we determined in the *Validation Order* that the record before us was insufficient to resolve the issue. Therefore, we requested further comment on this issue.[10] Eighteen parties filed comments, and eight filed replies.[11]

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[1] A collect call is one for which the calling party requests the interexchange carrier (IXC) to bill the call to the called party's line number. In these cases, only the local exchange carrier (LEC) serving the called party has access to the BNA information necessary to bill for the call.

[2] A third party call is one for which the calling party requests the IXC to bill the call to the line number of a third party. As with collect calls, only the LEC serving the third party has access to the BNA information necessary to bill for the call in these cases.

[3] For the purposes of this Order, "interstate service provider" includes interexchange carriers (IXCs), operator service providers (OSPs), enhanced service providers (ESPs), and any other provider of telecommunications services.

[4] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Report and Order, 7 FCC Rcd 3528 (1992) (*Validation Order*) (*petitions for recon. pending*).

[5] LEC joint use calling cards bear account numbers supplied by a LEC, are used for the services of the LEC and an IXC, and are validated by access to data maintained by the LEC.

[6] "Validation data" are the 10-digit telephone line number or Revenue Accounting Office (RAO)-based account number for a LEC joint use card, (2) the 4-digit personal identification number (PIN) associated with the account, and (3) the updated presence or absence of those numbers in the LECs' databases. RAO numbers are based on a non-line numbering system originally created before the AT&T divestiture. *Validation Order*, 7 FCC Rcd at 3529.

[7] "Screening data" are the data required to ascertain whether collect calls or third party calls can properly be charged to the line identified by the caller. *Validation Order*, 7 FCC Rcd at 3529.

[8] *Validation Order*, 7 FCC Rcd at 3535, para. 38.

[9] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Notice of Proposed Rulemaking, 6 FCC Rcd 3506 (1991) (*Validation Notice*), *petition for review pending sub. nom.* Capital Network System, Inc. v. FCC, No. 91-1280 (D.C. Cir., argued Jan. 28, 1993).

[10] *Validation Order*, 7 FCC Rcd at 3537, para. 46.

[11] A list of the commenting parties to our supplemental request for information on BNA, with abbreviations for each party, is found at Appendix A. Independent Telecommunications Network (ITN) filed comments raising issues regarding the rate structure for line information database (LIDB) calling card

3. In the *Validation Order*, the Commission also addressed the issue of how access to BNA could best be provided. We determined that both the LECs and the IXCs have a variety of network configurations and usage patterns which could justify different methods for making BNA available. We did not identify a single method for the LECs to use to provide BNA access, and we requested in the *Validation Order* additional comment on the issue of whether the Commission should prescribe a specific BNA service rate structure.[12]

4. We also addressed in the *Validation Order* certain privacy concerns inherent in disclosing to any entity the BNA data for a LEC subscriber. We concluded that privacy concerns similar to those found with Customer Proprietary Network Information (CPNI) may arise if BNA is used by any entity for non-billing purposes such as marketing. We requested further comment on the privacy problems that could arise if we mandate BNA access.[13]

II. DISCUSSION

A. Non-discriminatory Access to BNA Data

1. Jurisdiction

a. Background

5. In the *Validation Notice* and *Order*, the Commission proposed that LECs be required to provide "stand alone" BNA data for LEC joint use cards in order to enable the IXCs to bill the customer directly for the services they provide. We also solicited comment on the need for BNA associated with third party and collect calls.[14] The Commission observed that BNA is essential to make validation service of any practical value to those IXCs who do not have billing and collection agreements with the LECs. We found that BNA is generated by LECs in the provision of local exchange service and appeared to be uniquely in the possession of the LEC. We tentatively concluded that access to BNA, like validation data, is an integral part of exchange access, and should be provided by the LECs on a tariffed, non-discriminatory basis at just and reasonable rates.[15]

6. However, the Commission also decided that the record before us was insufficient to resolve the issue of whether the LECs should be required to disclose BNA to any IXC handling a call billed to a LEC joint use card, a third party call, or a collect call. We stated that some commenters had argued that the Commission should regulate BNA, if at all, under Title I. We asked for additional comment addressing (1) the Commission's jurisdiction over BNA, (2) the extent to which the unavailability of BNA is a problem for IXCs, and (3) how the Commission could tailor regulatory requirements for BNA to best address IXC concerns.

b. Positions of the Parties

7. Several LECs strongly oppose providing stand-alone BNA under Title II, making two general arguments: (1) BNA is not a Title II service, and so not subject to our jurisdiction, and (2) BNA is a competitive service which should not be regulated.[16]

8. Some LECs contend that BNA for calling card accounts is not a Title II service because, while BNA is an integral part of a calling card transaction, it is not necessary for call completion and that IXCs do not need BNA since the LEC can bill for the call.[17] Several LECs argue that the Commission found BNA to be a function of billing and collection in the *Detariffing Order* [18] and thus outside Title II.[19] Rochester denies that BNA is a by-product of exchange access service, arguing that this information is collected from customers at the time calling cards are issued.[20] IXCs and other telecommunications service providers, on the other hand, insist that the LECs must provide BNA under Title II, because LEC BNA data is a byproduct of local exchange service and no alternative sources of up-to-date BNA exist.[21]

9. Many LECs state that Title II regulation is not necessary because they already offer BNA to IXCs on non-discriminatory terms or as part of their billing and collection services.[22] Rochester contends that BNA provision on a common carrier basis is unnecessary because LECs are required to provide calling card validation information on a common carrier basis.[23] Pacific states it currently provides BNA under its state tariff to customers who need information to bill a call and who provide the

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validation service we established in the *Validation Order*. These issues are not relevant to the issues targeted for this pleading cycle, *i.e.*, whether BNA access service is subject to Title II. *Validation Order*, 7 FCC Rcd at 3537, para. 46. Accordingly, we will not consider ITN's comments further.

[12] *Validation Order*, 7 FCC Rcd at 3538, paras. 51-52.

[13] *Id.* at 3539, paras. 58-59.

[14] *Validation Notice*, 6 FCC Rcd at 3509, para. 30.

[15] *Validation Order*, 7 FCC Rcd at 3535, para. 38.

[16] Ameritech Comments at 2; Bell Atlantic Comments at 2; GTE Comments at 2-3; NYNEX Comments at 3; US West Comments at 30. *See also* Rochester Comments at 2-3; NTCA Comments at 2-4; USTA Comments at 2.

[17] Rochester Comments at 3; GTE Comments at 2-3; US West Comments at 27.

[18] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986) (*Detariffing Order*); *recon. denied*, 1 FCC Rcd 445 (1986) (*Detariffing Reconsideration Order*).

[19] *See, e.g.*, Ameritech Comments at 2; GTE Comments at 1-2; BellSouth Reply at 2.

[20] Rochester Reply at 2-3. Rochester also maintains that, if LECs are required to provide BNA for their calling card users, IXCs should be required to release BNA concerning their customers. Rochester Reply at 3-4.

[21] MCI Comments at 2-4; Sprint Comments at 2; ITI Comments at 2-4; TMA Comments at 1-3; Integretel Comments at 4-6. TMA also argues that access to BNA is critical for switchless resale providers to accurately provision and support their end users' direct billed services. TMA Comments at 2.

[22] NTCA Comments at 6-7; Rochester Comments at 3-4; Ameritech Comments at 2; USTA Comments at 31; Bell Atlantic Comments at 2; Centel Comments at 1; GTE Comments at 1-2; NYNEX Comments at 2; Pacific Comments at 2; US West Comments at 4-7; BellSouth Reply at 3; Southwestern Bell Reply at 1-2; GTE Reply at 3. *See also* US West Comments at 29-31 (the Commission need not exercise its authority to regulate BNA because IXCs have recourse to the complaint process if LECs unreasonably refuse to make BNA available). We listed the carriers' individual BNA service arrangements in the *Validation Order*, 7 FCC Rcd at 3535, paras. 40-41.

[23] Rochester Comments at 4.

originating phone number.[24] Ameritech states that market demand for BNA is minimal and it has received no complaints about the availability of its BNA service.[25] US West asserts that BNA for most customers is available from telephone directories or non-LEC sources.[26] Some LECs argue that customer confusion from multiple bills will result if BNA provision becomes a common carrier service.[27] These LECs also maintain that they will be competitively disadvantaged in the calling card market if the Commission requires them, but not other card competitors, to provide BNA information under Title II.[28] Some LECs claim that BNA listing information is the LEC's customer list for its competitive calling card service.[29] Bell Atlantic and Integretel assert that the Commission can ensure that BNA is available to all carriers on a non-discriminatory basis under its Title I jurisdiction, without having to place Title II burdens on the LECs.[30] Several LECs oppose providing BNA information to enable IXCs to bill for calls made with LEC-issued cards under any circumstances.[31]

10. Billing and collection can only be provided as a competitive service, responds MCI, if BNA services are tariffed.[32] In many instances, says ITI, the IXC refuses to process the call because the LEC which controls the calling card account information will not provide billing and collection services to the IXC.[33] IXCs claim that the LECs discriminate against them by negotiating billing and collection contracts with only some IXCs.[34] Southwestern Bell maintains that this is a disguised argument for retariffing billing and collection.[35]

c. Discussion

11. In making a determination of our Title II authority over a service, it is "necessary first of all to set forth the scope of the mandate Congress entrusted to us."[36] Title I of the Communications Act confers upon the Commission jurisdiction over "interstate and foreign communication by wire or radio ..."[37] Title I defines "wire communication" or "communication by wire" as:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services ... incidental to such transmission.[38]

12. Title II grants the Commission authority over "common carriers" engaged in the provision of interstate or foreign communication services.[39] Thus, to determine whether an activity is subject to our Title II jurisdiction and the requirements of Title II, we must determine whether (1) such activity constitutes "wire communication" within the meaning of Section 3(a) of the Communications Act, 47 U.S.C. § 153(a), and (2) such activity is provided on a common carrier basis within the meaning of Section 3(h) of the Communications Act, 47 U.S.C. § 153(h).[40]

13. With regard to the first question, in view of the broad language of Section 3(a), we conclude that obtaining and disclosing BNA data is incidental to the LEC's provision of access service.[41] LECs obtain BNA informa-

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[24] Pacific Comments at 2-3.

[25] Ameritech Comments at 2-4.

[26] US West Comments at 22-26, 28. *See also* USTA Comments at 2-3 (claiming BNA information is available from third parties).

[27] Rochester Reply at 3; Bell Atlantic Comments at 1-2; GTE Comments at 3-4; Southwestern Bell Reply at 2-3. *See also* NTCA Comments at 2; USTA Comments at 3-4.

[28] Ameritech Comments at 3; GTE Reply at 1-2; Southwestern Bell Reply at 4; Rochester Reply at 3-4; NTCA Comments at 2-4.

[29] Bell Atlantic Comments at 2-3; Ameritech Comments at 3; US West Comments at 27-30; NTCA Comments at 4.

[30] Integretel Comments at 5-8; Integretel Reply at 3-5; Bell Atlantic Comments at 2 n.4. *See also* Bell Atlantic Comments, CC Docket No. 91-115, filed Aug. 15, 1991, at 9-10.

[31] Bell Atlantic Comments at 2. *See also* GTE Comments at 4-5 (IXCs should not be allowed to interfere with the relationship between LECs and their calling card customers). NTCA contends that, if IXCs have the capability of performing their own billing and collection, then LECs would be precluded from performing these services, and speculates that some LECs would consider stopping issuing cards. NTCA Comments at 2-3.

[32] MCI Comments at 2-4; MCI Reply at 2-4. *See also* Integretel Reply at 5-7.

[33] ITI Comments at 1-2.

[34] ITI Comments at 3-5; Integretel Comments at 2, 5, 10. MCI Comments at 4; Sprint Comments at 2; TMA Comments at 3-4.

[35] Southwestern Bell Reply at 3-4.

[36] Graphnet Systems, 73 F.C.C. 2d 283, 287 (1979) *(Graphnet)*.

[37] Section 2(a) of the Communications Act, 47 U.S.C. § 152(a). The courts and the Commission have held that Sections 1 and 2 of the Communications Act, 47 U.S.C. §§ 151, 152, and other provisions of the Communications Act are to be construed broadly and expansively. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) *(Pottsville)* (underlying the Communications Act is recognition of the "rapidly fluctuating" nature of the communications field and of the corresponding need for the Commission to "possess sufficient flexibility to adjust itself" to this rapid change); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) *(NBC)* (Congress granted the Commission a "comprehensive mandate" with "not niggardly but expansive powers" over the provision of communications services); *General Tel. of the Southwest v. FCC*, 449 F.2d 846, 853 (5th Cir. 1971) *(General Telephone)* (the intent of Congress was to "endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications"); *Graphnet*, 73 F.C.C. 2d at 288 (the Commission has "broad and flexible regulatory powers regarding interstate and foreign communications").

[38] Section 3(a) of the Communications Act, 47 U.S.C. § 153(a).

[39] *Graphnet*, 73 F.C.C. 2d at 288. A common carrier is defined by the Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio ...." 47 U.S.C. § 153(h).

[40] *See, e.g., Validation Order*, 7 FCC Rcd at 3531, paras. 18-19; Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 1423, 1426, para. 26 (1993); Southwestern Bell Telephone Company, *et al.*, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd 2589, 2592 (paras. 11-12) (1993) *(Dark Fiber Discontinuance Denial Order)*.

[41] *See also* United States v. AT&T, 552 F. Supp. 131, 228 (D.C.C. 1982) (Modification of Final Judgement or MFJ) ("Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, ... the provision of information necessary to bill customers.")

tion in the course of doing business as local exchange service providers, because the LECs must obtain an end user's billing name and address in order to provide local exchange service. When a LEC permits customers to use local exchange service accounts to pay for another carrier's telecommunications services, whether by use of a LEC joint use calling card or through collect or third party calls billed to subscriber line accounts, the LEC's provision to that carrier of the validation and BNA data that enables such a payment system is incidental to the LEC's provision of access to the underlying exchange service which generates the data.[42] As a service "incidental" to the LEC's provision of basic access service, BNA access is a communications service within the meaning of Section 3(a). Moreover, as we noted in the *Validation Order* with respect to validation and screening data, access to BNA is necessary, as a practical matter, in order for interexchange carriers to provide operator services using LEC joint use cards.[43]

14. Rochester argues that, because BNA information for calling cards is collected from customers at the time those cards are issued, calling card BNA is not a byproduct of exchange access service.[44] However, LECs collect and maintain BNA information on all their customers, regardless of whether those customers have calling cards. While LECs may require calling card customers to repeat their name and address on an application form prior to issuing the calling card, this does not alter the fact that the LEC's relationship with the customer arises from LEC provision of local exchange service to the customer and that the LEC will update BNA data to reflect the status of the customers' local exchange service. Thus, Rochester has not rebutted our finding above that BNA is incidental to access service.

15. With regard to the second question, we find that BNA access service is a common carrier service under Section 3(h) of the Communications Act. Under the test enunciated in *NARUC I*,[45] an entity is a common carrier with respect to a particular service if it is under a legal compulsion to "hold [itself] out indiscriminately to the clientele [it] is suited to serve."[46]

16. Applying this test to BNA access, we conclude that BNA access should be treated as a Title II common carrier service. In applying the *NARUC I* test, when the service provider possesses market power, and there is no countervailing factor militating against the exercise of such power, we have required the provider of a communications service to hold itself out indiscriminately to the public on a common carrier basis.[47] In the instant case, the record reveals that only the LECs can provide BNA in accurate, up-to-date form.[48] BNA is generated exclusively by LECs as a byproduct of their provision of exchange access service, and only LECs have the capacity to keep this information current.[49] Other sources of BNA information identified by opponents of BNA access are neither as accurate nor as complete as the data maintained by the BOCs. For instance, Integretel asserts that while certain non-telecommunications collection agencies have compiled incomplete lists which match telephone numbers with BNA, these companies produce accurate information for only approximately forty percent of all bills.[50] These directories are not current enough to permit billing and collection for third party and collect calls. Based on these factors, we conclude we cannot rely on competition to ensure that IXCs have access to reliable, current BNA, and we cannot be confident that all LECs will provide BNA at reasonable rates and in a nondiscriminatory basis unless BNA is regulated as a Title II service.[51] Accordingly, we conclude that LECs should be required to tariff BNA information to interstate communications service providers.

17. We disagree with US West's argument that there is a high correlation between the name and address of an end user listed in a white pages directory and the end user's BNA so as to make it unnecessary for us to require the LECs to provide BNA. The name and address listed in a white pages directory is not necessarily the billing name and address for the customer listed. Nor are these directories updated and published as frequently as the BNA data bases maintained by the LECs for their billing purposes. In short, an IXC who needs to bill a customer directly cannot obtain accurate and current BNA information from a source other than the LEC.[52]

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[42] In the *Validation Order*, we rejected arguments that a service must be technologically necessary for call completion to be considered incidental to the provision of exchange access service. *Validation Order*, 7 FCC Rcd at 3531-32, para. 21. A service may be properly considered "incidental" to wire communication within the meaning of Section 3(a) even if it is not strictly necessary to complete a call. The language of Section 3(a) is quite broad: "wire communications" includes, *inter alia*, all services incidental to transmission. In view of this broad language, we thus conclude that, as a service "incidental" to the LECs' local exchange access service, provision of validation data is "wire communications" under Section 3(a) of the Communications Act and is properly considered a communications service.

[43] *Validation Order*, 7 FCC Rcd at 3532.

[44] Rochester Reply at 2-3.

[45] NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied* 425 U.S. 992 (1976) (*NARUC I*).

[46] *Id.* at 641, 642. *See also* Norlight Request for Declaratory Ruling, 2 FCC Rcd 132, *recon. denied*, 2 FCC Rcd 5167 (1987).

[47] *Norlight*, 2 FCC Rcd at 134.

[48] Integretel Reply at 4; MCI Reply at 3-4.

[49] *Validation Order*, 7 FCC Rcd at 3535, para. 38; *Cincinnati Bell Order*, 6 FCC Rcd at 3503, para. 19.

[50] *See* Integretel Comments, CC Docket No. 91-115, filed Aug. 15, 1991, at 12-14; Integretel Reply, CC Docket No. 91-115, filed Aug. 15, 1991, at 2-4. *See also* Americall Comments, CC Docket No. 91-115, filed Aug. 15, 1991, at 18-25.

[51] MCI Comments at 3-4; ITI Comments at 3-5; Integretel Comments at 2, 5, 10; Sprint Comments at 2; TMA Comments at 3-4.

[52] Several LECs claim they are already providing BNA on a reasonable non-discriminatory basis, either as part of their billing and collection services or under contract. NTCA Comments as 6-7; Rochester Comments at 3-4; Ameritech Comments at 2; USTA Comments at 31; Bell Atlantic Comments at 2; Centel Comments at 1; GTE Comments at 1-2; NYNEX Comments at 2; Pacific Comments at 2; US West Comments at 4-7; BellSouth Reply at 3; Southwestern Bell Reply at 1-2; GTE Reply at 3. *See also* US West Comments at 29-31 (the Commission need not exercise its authority to regulate BNA because IXCs have recourse to the complaint process if LECs unreasonably refuse to make BNA available). We listed the carriers' individual BNA service arrangements in the *Validation Order*. We also note that

18. Arguments that a BNA tariffing requirement would create a competitive disadvantage for LECs in the calling card market are unfounded. Our requirement to provide BNA on a common carrier basis will improve, not limit, competition in the calling card market. We found above that LECs alone have access to accurate, up-to-date BNA information. As a result, LECs would have a strong competitive advantage in the billing and collection market in their service region unless they are required to provide BNA on a common carrier basis. Thus, LECs have a competitive advantage as a result of their provision of local exchange service that is not available to other calling card issuers. Requiring LECs to provide BNA information on a common carrier basis reduces this advantage by making accurate, up-to-date BNA information available to all calling card issuers. Other calling card competitors will be competitively disadvantaged in the calling card market if the Commission does not impose this requirement.

19. Many LECs argue that BNA is a deregulated[53] billing and collection service pursuant to the Commission's *Detariffing Order*. [54] To the contrary, we believe our action herein is not precluded by the discussion of BNA in the *Detariffing Order*. In that order, the Commission determined that the billing and collection service provided by the LECs for IXCs should no longer be subject to common carrier regulation under Title II.[55] We also declined to exercise our Title I ancillary jurisdiction over the LECs' provision of billing and collection service based on a finding that there were no barriers to entry in the billing and collection market.[56] Our discussion of BNA was ambiguous. Although BNA provision was addressed in the course of this discussion, we qualified this last finding concerning the lack of entry barriers in the billing and collection market by noting that a "potential bottleneck in this respect is an I[X]C's or billing vendors' inability to get customer name and address information from the LEC."[57] Moreover, we expressed concern that this inability would impede the IXC's ability to perform its own billing and collection. Accordingly, we observed that our decision to refrain from exercising our Title I jurisdiction over billing and collection services was based, in part, on the LECs' continuing to provide BNA on a reasonable basis, and that we would consider requiring LECs to fulfill IXC requests for BNA should problems develop.[58]

20. This potential for LEC discrimination in the provision of BNA was again cited in our rejection of MCI's petition for reconsideration of the *Detariffing Order*, which requested that the Commission require tariffing of BNA data. Again, the Commission stated an expectation that local exchange carriers would make BNA information readily available at reasonable prices, and resolved to take appropriate action if these concerns were not met.[59] As discussed above, it is now apparent from the record in this docket that only the LECs can provide BNA in accurate, up-to-date form, and we cannot be confident that all LECs will provide BNA at reasonable rates and in a nondiscriminatory basis unless BNA is regulated as a Title II service. Accordingly, we will now regulate BNA as a common carrier service under Title II.[60] Regulation of BNA under Title II will help to ensure a competitive billing and collection market and thus is consistent with the Commission's fundamental objective in that proceeding.[61]

2. Means of Access to BNA

a. Positions of the Parties

21. In the *Validation Order*, we sought additional comment on whether the Commission should prescribe a specific BNA service rate structure.[62] The LECs who currently offer BNA do so under a variety of tariff and contract terms,[63] and most parties who commented on the issue agree that the Commission should not prescribe a single, uniform rate structure for BNA service.[64] ITI disagrees with these parties and believes the Commission should prescribe a rate structure and ensure that all carriers have the same choice of BNA service offerings as other carriers.[65]

b. Discussion

22. We adopt rule changes to establish a separate rate element in Part 69 of our rules for BNA service, because, in general, the Commission's policy is that the costs of providing a service should be borne by the cost causers.

GTE already provides BNA service under tariff as part of its Feature Group D interstate access service. *See Validation Order*, 7 FCC Rcd at 3535-36, paras. 40-41. For these carriers, the requirement to tariff their provision of BNA should not be burdensome.

[53] In the *Detariffing Order*, we concluded that we had no Title II jurisdiction over billing and collection and we therefore required carriers to remove those services from their tariffs. We retained Title I jurisdiction, however.

[54] *See, e.g.*, Ameritech Comments at 2-3; GTE Comments at 1-2; BellSouth Reply at 2.

[55] *Detariffing Order*, 102 FCC 2d at 1168-69.

[56] *Id.* at 1169-71.

[57] *Id.* at 1171 n.53.

[58] *Id.*

[59] *Detariffing Reconsideration Order*, 1 FCC Rcd at 446, para. 13.

[60] As we found in connection with validation and screening data, *Validation Order*, 7 FCC Rcd at 3532, para. 25, regulation of BNA under Title I ancillary jurisdiction might not be adequate to assure provision of BNA on a non-discriminatory basis, under just, reasonable and non-discriminatory rates, terms and conditions.

[61] In concluding that the provision of BNA is now properly subject to Title II regulation, we emphasize that we do not disturb our prior finding that the provision of interstate billing and collection services by a LEC to an unaffiliated IXC is not a common carrier service under Title II. *See Detariffing Order*, 102 FCC 2d at 1169.

[62] *Validation Order*, 7 FCC Rcd at 3538, paras. 51-52.

[63] Bell Atlantic Comments, filed Aug. 15, 1991 at 7 n.13; GTE Comments, filed Aug. 15, 1991, at 13-14; NYNEX Comments at 1-2; Rochester Comments at 3-4; US West Comments at 4-5, 12-15; BellSouth Comments, filed Aug. 15, 1991, at 5-7; Centel Comments at 3; NYNEX Comments at 2; Pacific Comments at 2; US West Comments at 18-21.

[64] GTE Comments at 5; USTA Comments at 4-5; Sprint Comments at 4; Sprint Reply at 2; MCI Comments at 3-4; PRTC Reply at 2; Southwestern Bell Reply at 4; Integretel Comments at 8-9.

[65] ITI Comments at 5-6.

However, we do not prescribe a single rate structure or any specific subelementsfor BNA. The record confirms our finding in the *Validation Order* that both the LECs and the IXCs have a variety of network configurations and usage patterns which could justify different methods for making BNA available.[66] The IXCs indicate that their BNA needs vary. We believe the LECs, in consultation with the IXCs, are in the best position to determine how BNA can be provided in the most useful manner. We also believe the LECs should be able to experiment with different BNA offerings based on customer need. Therefore, we will not prescribe a single method for the LECs' provision of BNA access, nor will we prescribe a specific BNA service rate structure within the separate rate element we create today. We will evaluate the reasonableness of the LECs' BNA rate structures in the context of the tariff review process.

23. Carriers who are subject to our price cap rules must include the BNA access element we establish herein in one of the price cap baskets described in Section 61.42(d) of our rules. Under the price cap rules, new services that are initially held outside of price cap baskets are eventually subjected to price cap index limitations.[67] Creation of new Part 69 elements therefore raises issues as to which price cap basket the elements will eventually be assigned for the purposes of computing indexes. When we created the price cap baskets for LECs, we balanced two competing concerns. First, we limited the number of baskets to ensure that the company-wide productivity offset would be appropriate for each basket. Second, because we wanted to preclude LECs from disadvantaging one class of customers in order to lower prices charged to another class, we based the baskets on existing access categories.[68] Since BNA access is used to facilitate the delivery of switched access service, BNA access belongs in the switched traffic sensitive basket for price cap purposes. Accordingly, when the LECs incorporate BNA into their price cap indexes (PCIs), we will require BNA to be included in the switched traffic sensitive basket.

24. Finally, we revise the price cap rules to establish a new service category for BNA service in the switched traffic sensitive basket since BNA access service is not sufficiently similar to any existing service to be included in an existing service category.[69]

B. Privacy Concerns

1. Background

25. In the *Validation Order*, we determined that some of the ways BNA could be provided might raise privacy concerns and questions of compliance with state disclosure laws. Specifically, we concluded that privacy concerns similar to those we have found with customer proprietary network information (CPNI) may arise if BNA is used for non-billing purposes.[70] To assist us in resolving privacy-related issues, we solicited comments on the following questions.[71]

1. Should BNA disclosure be limited to IXCs?

2. Should recipients of BNA data be precluded from using BNA for purposes other than billing?

3. Would provision of BNA on a bulk basis raise privacy concerns different from those raised by disclosure on a per call basis?

4. Have the states established regulations governing the use of customer billing information, including BNA, which are pertinent to the issues raised in this Order?

5. Should carriers establish subscriber notification or authorization procedures before divulging BNA to third parties?

26. In their responses to our questions, the commenters have raised several specific privacy-related issues. We address each of these issues below.

2. Expectation of Privacy

a. Position of the Parties

27. US West denies that there are any serious privacy concerns regarding the use of BNA information by third parties. US West doubts that end users consider this information private.[72] US West also maintains that the Commission has in prior proceedings permitted LECs to sell some BNA information to assist in billing and collection activities.[73] US West asserts that in most cases, BNA corresponds to listed name and address, and that in many cases when BNA does not correspond to listed name and address, the customer has established a different billing address for convenience in billing rather than to maintain privacy.[74] Finally, US West asserts that the expectations of privacy regarding BNA are not analogous to the expectations regarding CPNI.[75] Most other commenters maintain that customers expect their BNA data to be used only for billing telephone calls, and that customers indirectly consent to BNA disclosure for this purpose.[76]

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[66] *Validation Order*, 7 FCC Rcd at 3538, para. 51-52.

[67] *See* Section 61.42(g) of the Commission's Rules, 47 C.F.R. § 61.42(g).

[68] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6812, para. 201-211 (1990) (*LEC Price Cap Order*).

[69] The service categories within the switched traffic sensitive basket group similar services together. *See LEC Price Cap Order*, 5 FCC Rcd at 6811, para. 203.

[70] *Validation Order*, 7 FCC Rcd at 3539, para. 58.

[71] *Validation Order*, 7 FCC Rcd at 3539, para. 59.

[72] US West Comments at 7-8.

[73] *Id.* at 8-9, *citing* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 F.C.C. 2d 1082, 1287-88 (1984); *Detariffing Order*, 102 F.C.C. 2d at 1171 n.53; *Detariffing Reconsideration Order*, 1 FCC Rcd at 446; Public Service Commission of Maryland and Maryland People's Counsel, 4 FCC Rcd 4000, 4005-06 (1989) (*Maryland PSC Order*).

[74] US West Comments at 9-10.

[75] *Id.* at 14.

[76] PRTC Reply at 1; Ameritech Comments at 5-6; Bell Atlantic Comments at 4; BellSouth Comments at 2; California Comments at 3; Centel Comments at 2-3; GTE Comments at 6; Integretel Comments at 11; Pacific Comments at 3; Sprint Comments at 2.

b. Discussion

28. As stated above, we determined in the *Validation Order* that BNA could be provided in a variety of ways, some of which might raise privacy concerns and questions of compliance with state nondisclosure laws. Specifically, we concluded that privacy concerns similar to those we have found with CPNI may arise if BNA is used for non-billing purposes.[77] We are not persuaded that our initial conclusion was incorrect. While end users may have no reasonable expectation of privacy regarding disclosure of BNA to telecommunications service providers for billing purposes, there is substantial evidence in the record that end users do not expect their BNA information to be released for other purposes.[78] Accordingly, we decline to reverse our finding in the *Validation Order* that BNA disclosure raises significant privacy issues.

3. Limitations on Parties to Whom BNA May Be Disclosed

a. Positions of the Parties

29. Most parties believe that LECs should only be required to disclose BNA to interstate service providers who need it for billing purposes.[79] Bell Atlantic states that, if the Commission requires BNA disclosure, then each LEC should be required to disclose BNA to anyone honoring its calling card.[80] Sprint and Integretel state that BNA should be disclosed to IXCs and their authorized agents.[81] Pacific believes competition would be enhanced if BNA is available to any entity for billing purposes.[82] Centel and US West argue that BNA should be disclosed to ESPs as well as IXCs.[83]

b. Discussion

30. Many commenters argue that customers expect their BNA data to be used only for billing telephone calls.[84] We conclude that the privacy concerns of customers are important and must be given substantial weight. Nevertheless, we must balance the privacy concerns of end users described above with interstate service providers' need to obtain payment for their services. We believe that end users who wish to have their calls billed to their card or line accounts give implied consent to the LEC to disclose line or card account BNA to the interstate service provider whose services the caller uses. Moreover, carriers must be able to bill and collect for the services they provide, or obtain billing and collection services from a third party at reasonable rates. As we found in the *Detariffing Order*, BNA availability to all carriers wishing to do their own billing and collection and to third party billing agents ensures that competitive forces will keep the rates for LECs' billing and collection services reasonable.[85]

31. We see no reason to permit BNA disclosure to parties other than interstate service providers and their authorized billing agents. Wider dissemination of BNA would contribute nothing to competition in the billing and collection market, but would increase the risk that end users' reasonable privacy expectations would be compromised. Accordingly, we prohibit disclosure of BNA to parties other than interstate service providers and their authorized billing agents. We limit BNA disclosure to those interstate service providers to which the end user has offered a calling card account or a line account.[86] as payment for services.[87]

4. Uses of BNA

a. Positions of the Parties

32. Most commenters agree that customers expect that their BNA data will be used only for billing telecommunications services, and that customers implicitly consent to BNA use for this purpose when they use their line or card account to obtain such services.[88] USTA asserts that a carrier-drafted billing and collection agreement would better protect privacy interests of end users than a prohibition against BNA use by interstate service providers for non-billing purposes.[89] Alternatively, US West believes that recipients of BNA access who have an existing business relationship with the calling party and who receive BNA as a result of a "need to bill" should be able to use this information for marketing as well as billing and

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[77] *Validation Order*, 7 FCC Rcd at 3539, para. 58. We were also concerned that some businesses would not expect this information to be used for non-network purposes without express permission. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, 104 F.C.C. 2d 958, 1089-90, para. 261 (1986)(*Computer III*); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, 2 FCC Rcd 3035, 3093 paras. 142-143, 3095 para. 154 (1987)(*Phase II Order*). Accordingly, we required BOCs to obtain customer authorization for the release of their CPNI. *Phase II Order*, 2 FCC Rcd at 3095, paras. 154-155. *See also Computer III Remand Proceedings:* Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571, 7609-13 paras. 84-89 (1991) (*BOC Safeguards Order*).

[78] PRTC Reply at 1; Ameritech Comments at 5-6; Bell Atlantic Comments at 4; BellSouth Comments at 2; California Comments at 3; Centel Comments at 2-3; GTE Comments at 6; Integretel Comments at 11; Pacific Comments at 3; Sprint Comments at 2.

[79] *See, e.g.*, Ameritech Comments at 4-5; Centel Comments at 2; GTE Comments at 6; NYNEX Comments at 1-3; Pacific Comments at 3; BellSouth Comments at 1; USTA Comments at 5.

[80] Bell Atlantic Comments at 4.

[81] Integretel Comments at 10; Sprint Comments at 2.

[82] Pacific Comments at 3.

[83] Centel Comments at 2; US West Comments at 14-15.

[84] PRTC Reply at 1; Ameritech Comments at 5-6; Bell Atlantic Comments at 4; BellSouth Comments at 2; California Comments at 3; Centel Comments at 2-3; GTE Comments at 6; Integretel Comments at 11; Pacific Comments at 3; Sprint Comments at 2.

[85] *Detariffing Order*, 102 F.C.C. 2d at 1171 n.53.

[86] An end user offers a line account as payment for services when placing third party calls and collect calls.

[87] *See* note 3 of this Order, *supra*, for our definition of "interstate service provider" for purposes of this Order.

[88] PRTC Reply at 1; Ameritech Comments at 5-6; Bell Atlantic Comments at 4; BellSouth Comments at 2; California Comments at 3; Centel Comments at 2-3; GTE Comments at 6; Integretel Comments at 11; Pacific Comments at 3; Sprint Comments at 2.

[89] USTA Comments at 5-6.

collection.[90] If an entity does not have a business relationship with a caller (*e.g.*, where a caller uses 0+ or 0-), US West thinks it is reasonable to restrict the purchaser's use to billing and collection only, but does not see a need for this restriction.[91]

b. Discussion

33. We conclude that customers consent to the disclosure of their BNA information to the service providers they use, but only for the purpose of enabling those providers to bill and collect for the service obtained by the end user. We mandate that anyone acquiring BNA access from a LEC must use BNA only for billing the LEC customer for telecommunications services and collecting the amounts due. We also note that our complaint process will be available to anyone sustaining damage as a result of misuse of BNA information. We believe this approach, in addition to the other requirements we establish in this Order, will minimize unauthorized BNA disclosure or use and be consistent with the state laws regarding customer privacy. The most significant concern of the parties appears to be the possibility that an end user's BNA could be used for marketing purposes.[92] Limiting BNA access to interstate carriers who will use BNA only for billing and collection purposes adequately addresses this concern.

5. Bulk Availability

a. Background

34. In the *Validation Order*, we solicited comment on the privacy issues surrounding the availability of "bulk BNA," and how these issues differ from the issues surrounding the availability of "per call BNA."[93] By "bulk BNA," we mean periodic disclosure to an IXC or its agent of the BNA required to bill for all of the calls handled by that IXC and charged to end users' line or card accounts during a billing cycle or other specified time period. By "per call BNA," we meant transfer of billing information for each call at or near the time that a call is completed. It appears that the commenters have misunderstood our use of the term "bulk BNA" to mean disclosure of the BNA for all the line and card accounts in the LEC's records. In order to avoid this confusion in this Order and in the future, we describe the BNA required to bill for all of the calls in a specific time period as "periodic BNA," and we describe all the BNA in the LEC's records as "bulk BNA."

b. Positions of the Parties

35. A number of parties agree that carriers should have enough access to BNA to perform their own billing and collection, but claim that provision of BNA in bulk is unnecessary to accomplish billing and could lead to abusive use of the information for marketing purposes.[94] Sprint appears to advocate BNA provision on a periodic basis.[95] Integretel believes that mandated bulk provision would increase costs to IXCs who want to purchase BNA, because IXCs would be forced to purchase more information than they need.[96] USTA believes that carriers need "something other than" BNA offered on a real-time, per call basis, but argues that bulk BNA disclosure would make it difficult to protect the privacy of end users.[97] California argues that current LEC practice under equal access arrangements is to transfer BNA information on all the customer information presubscribed to a particular IXC to that carrier.[98] However, US West argues that bulk BNA raises no privacy concerns different from BNA offered on a periodic basis and should be permitted.[99]

c. Discussion

36. We have concluded that LECs should be given substantial flexibility to conform their BNA offerings to the legitimate needs of their IXC customers. Nevertheless, as noted above, we recognize that the privacy concerns of customers are critical and must be given substantial weight. There is substantial support in the record for prohibiting release of all the BNA in the LECs' records because of the risk of invading customers' privacy. Accordingly, at this time, we will not permit LECs to release all the BNA in their records.

37. On the other hand, with these restrictions in place, we do not believe that the provision of BNA on a per call basis raises privacy concerns different from those raised by provision of other forms of periodic BNA. Furthermore, we believe permitting either periodic or per-call BNA, or both, will allow LECs and IXCs flexibility to provide BNA in the form best suited to their facilities.[100] Ameritech and Sprint supported periodic BNA provision in their comments.[101] Therefore, in order to allow IXCs to purchase BNA according to specific need, we conclude that LECs may provide access to BNA for its joint use cardholders on a per-call or periodic basis, concurrent with the restrictions on disclosure and use discussed here-

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[90] US West Comments at 4-5, 15-16.

[91] US West Comments at 15.

[92] GTE Comments at 6; Bell Atlantic Comments at 3; Ameritech Comments at 6-7; BellSouth Comments at 2; Rochester Comments at 5-6; Sprint Comments at 3.

[93] *Validation Order*, 7 FCC Rcd at 3539, para. 59.

[94] *See* Sprint Comments at 3; GTE Comments at 6; Bell Atlantic Comments at 3; Ameritech Comments at 6-7; BellSouth Comments at 2; Rochester Comments at 5-6. Pacific maintains that bulk BNA disclosure might violate California law. Pacific Comments at 4.

[95] Specifically, Sprint states that it advocates disclosure of BNA on a "per call" basis, but that disclosure should be made "as requested" and "for the sole purpose of billing," rather than on a real-time basis. Sprint Comments at 3-4. Ameritech states that BNA should be disclosed only in conjunction with specific calls. Ameritech Comments at 6-7.

[96] Integretel Comments at 9.

[97] USTA Comments at 6.

[98] California Comments at 3-4. In its earlier comments, SNET proposed bulk provision of BNA via magnetic tape or as part of existing billing and collection arrangements as an alternative to BNA provision through LIDB. SNET Comments, filed Aug. 15, 1991, at 6.

[99] US West Comments at 17-18.

[100] Sprint argues that real time, per call BNA disclosure is not technologically available at this time. Sprint Comments at 3-4. Until the LECs develop this capability, permitting either per call or periodic BNA disclosure will be equivalent to requiring periodic BNA disclosure.

[101] Ameritech Comments at 6-7; Sprint Comments at 3-4.

in. We also permit disclosure of BNA associated with collect and third party calls on a per-call or periodic basis.[102]

6. Prior Authorization

a. Positions of the Parties

38. Most parties believe that it is unnecessary to obtain end user authorization or notification before disclosing the end user's BNA to a telecommunication service provider. BellSouth states that notification is difficult and expensive to implement and would delay call set-up since IXCs and other providers would be reluctant to provide service without a guarantee that they would receive the necessary BNA data.[103] Some LECs contend that authorization or notification is unnecessary because end users reasonably expect their BNA to be used to bill calls.[104] If the Commission requires authorization or notification, USTA asserts that the BNA recipient should pay for it and ensure that the LECs are protected against disputed disclosure approvals.[105] PRTC and Bell Atlantic, however, contend that prior end user consent, whether express or implied by virtue of a business transaction, should be required before the LEC may disclose BNA.[106]

b. Discussion

39. We conclude that it is in the public interest to require LECs to notify their subscribers that their BNA will be disclosed to IXCs, ESPs, and independent service providers to facilitate billing for telecommunications services. In their notices to subscribers, the LECs must explain that the subscriber's BNA data will be released to an interstate service provider when (1) the subscriber uses a LEC joint use card; or (2) the subscriber accepts a third party or collect call. This procedure will serve two purposes. First, each end user will be aware that BNA will be released to permit billing for services the end user has used and charged to a LEC calling card or on a third party or collect basis. Second, we believe that, by letting end users know what to expect, the procedure will alleviate the concerns of some LECs that, in the case of calls billed to LEC joint use cards, end users will be surprised and confused by multiple bills for services charged to their calling card. The record confirms that the cardholder's use of the card can reasonably be treated as authorization for disclosure once the cardholder is on notice that BNA will be disclosed.[107]

40. Disclosure of BNA for end users with unpublished or unlisted numbers presents special privacy concerns. We believe that such end users have a reasonable expectation that their name and address information will be protected. Therefore, in addition to the notification requirement established above, we also require LECs to obtain a one-time written authorization for BNA disclosure from existing and future LEC cardholders[108] having

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[102] Nothing in this Order shall preclude LECs from providing all the BNA associated with customers presubscribed to a particular IXC to that IXC.

[103] BellSouth Comments at 3.

[104] Pacific Comments at 4-5; Ameritech Comments at 7-8; US West Comments at 22; Centel Comments at 3-4; GTE Comments at 7; USTA Comments at 6-7. *See also* California Comments at 4.

[105] USTA Comments at 7.

[106] PRTC Reply at 2; Bell Atlantic Comments at 2.

[107] NTCA asserts that BNA disclosure to carriers without billing and collection agreements with the LEC might violate Federal Reserve System regulations prohibiting unsolicited issuance of credit cards, and requests that we require carriers to comply with these Federal Reserve System regulations. NTCA Comments at 8-9, *citing* Regulation Z, 12 C.F.R. § 226.12(a). *See also* Truth in Lending Act, 15 U.S.C. § 1642. Enforcement or interpretation of rules promulgated by other agencies is outside our jurisdiction. In any case, the parties have not demonstrated that our rules conflict with any banking regulations. If such a conflict does arise, the parties should bring it to our attention for resolution.

[108] Subscribers are given an opportunity to accept or reject charges to their line accounts for third party or collect calls prior to the completion of those calls and no BNA is released if the subscriber refuses the call. We conclude that this opportu-

unpublished or unlisted numbers. LECs will not be permitted to release the BNA of any end user with an unlisted or unpublished number until they receive written authorization. We believe that this one-time authorization requirement should not overburden the LECs. We would not expect these customers to unreasonably withhold authorization since they would have already obtained a LEC calling card on which their unpublished number may be listed and they will expect to be billed for calls made with that card.[109]

7. Preemption of State Regulation

41. The LECs provided information on state laws addressing BNA disclosure. This information is summarized in Attachment C of this Order. Pacific opposes preemption of state privacy regulations.[110] In general, preemption of state regulation should be as narrow as possible to accommodate differing state views while preserving federal goals.[111] We should only preempt when necessary to accomplish federal policy. There is no basis on this record for concluding that the requirements we adopt today will conflict with any existing state law. Accordingly, there is no need at this time to preempt state privacy regulations.

III. CONCLUSION

42. In this *Report and Order*, we require LECs to provide BNA for their LEC joint use calling cards pursuant to Title II in order to ensure that BNA is provided in a non-discriminatory manner at just and reasonable rates. Because of the variety of ways in which it is possible to offer BNA, we do not believe it is necessary to impose a uniform method of providing the service or a uniform rate structure. In order to balance the privacy concerns of end users with the telecommunications providers' need to obtain payment for their services, we require that LECs disclose BNA to IXCs and enhanced and information service providers and their authorized agents for the limited purpose of billing end users for telecommunication services charged to their LEC calling cards. In addition, we mandate a one-time notification requirement to all end users that BNA for their LEC card will be disclosed for billing purposes and we require the LECs to secure authorization for BNA disclosure from those end users with unlisted or unpublished numbers.

IV. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

44. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-205, Parts 61, 64, and 69 of the Commission's Rules, 47 C.F.R. Part 61, 64, 69, ARE AMENDED as set forth in Appendix B.

45. IT IS FURTHER ORDERED that all local exchange carriers that have issued local exchange carrier joint use calling cards as defined by this Order SHALL FILE, within 90 days of the release of this Order, tariff revisions to become effective on 45 days' notice that are consistent with this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 93-398.

46. IT IS FURTHER ORDERED that all local exchange carriers that have issued local exchange carrier joint use calling cards as defined by this Order SHALL PROVIDE notification as required by this Order to their subscribers, within 60 days of the release of this Order. Furthermore, all local exchange carriers that have issued local exchange carrier joint use calling cards as defined by this Order SHALL OBTAIN consent from their joint use calling card subscribers with unlisted or unpublished telephone numbers for disclosure of their billing name and address information for billing purposes, within 60 days of the release of this Order.

47. IT IS FURTHER ORDERED that the provisions in this Second Report and Order will be effective 30 days after FEDERAL REGISTER publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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nity to refuse a call is sufficient to protect from unwanted disclosure the BNA of end users with unpublished or unlisted numbers. Accordingly, we need not adopt any additional safeguards to protect unlisted or unpublished BNA with respect to collect or third party calls.

[109] If a cardholder with an unlisted or unpublished number refuses to authorize BNA disclosure, service providers to whom the card is presented will be unable to bill for charges to the card. In order to ensure that interstate service providers do not accept cards for which BNA will be unavailable, we require the LECs to modify their LIDB records to generate a "deny" response when queried about such cards.

[110] Pacific Comments at 3.

[111] *See BOC Safeguards Order*, 6 FCC Rcd at 7630-31, para. 121.

APPENDIX A

CC Docket No. 91-115 - Supplemental BNA Comments

COMMENTS:

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telecommunications, Inc. (BellSouth)

Central Telephone Company (Centel)

GTE Service Corporation and affiliated domestic GTE Telephone Operating Companies (GTE)

Integretel, Inc. (Integretel)

Independent Telecommunications Network, Inc. (ITN)

International Telecharge, Inc. (ITI)

MCI Telecommunications Corporation (MCI)

National Telephone Cooperative Association (NTCA)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell Companies (Pacific)

People of the State of California and the Public Utilities Commission of the State of California (California)

Rochester Telephone Corporation (Rochester)

Sprint Corporation (Sprint)

Telecommunications Marketing Association (TMA)

United States Telephone Association (USTA)

US West Communications (US West)

REPLY COMMENTS:

BellSouth

GTE

Integretel

MCI

Puerto Rico Telephone Company (PRTC)

Rochester

Southwestern Bell Telephone Company (Southwestern Bell)

Sprint

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 61 -- TARIFFS

1. The authority citation continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154.

2. The final period is deleted from Section 61.42(e)(1)(vi), and the following language is amended to Section 61.42(e)(1)(vi) as follows:

§ 61.42 Price cap baskets and service categories

* * * * *

(e)(1) * * *

(vi) * * * ; and

3. Section 61.42(e)(1)(vii) is added to read as follows:

§ 61.42 Price cap baskets and service categories

* * * * *

(e)(1) * * *

(vii) billing name and address, as described in § 69.128 of this chapter.

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

4. The authority citation continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted.

5. Section 64.1201 is added to read as follows:

§ 64.1201 Restrictions on billing name and address disclosure

(a) As used in this section:

(1) The term "billing name and address" means the name and address provided to a local exchange company by each of its local exchange customers to which the local exchange company directs bills for its services.

(2) The term "telecommunications service provider" means interexchange carriers, operator service providers, enhanced service providers, and any other provider of telecommunications services.

(3) The term "authorized billing agent" means a third party hired by a telecommunications service provider to perform billing and collection services for the telecommunications service provider.

(4) The term "bulk basis" means billing name and address information for all the local exchange service subscribers of a local exchange carrier.

(5) The term "LEC joint use card" means a calling card bearing an account number assigned by a local exchange carrier, used for the services of the local exchange carrier and a designated interexchange carrier, and validated by access to data maintained by the local exchange carrier.

(b) No local exchange carrier providing billing name and address shall disclose billing name and address information to any party other than a telecommunications service provider or an authorized billing and collection agent of a telecommunications service provider.

(c) No telecommunications service provider or authorized billing and collection agent of a telecommunications service provider shall use billing name and address information for any purpose other than billing customers for using telecommunications services of that service provider and collecting amounts due.

(d)(1) No local exchange carrier shall disclose billing name and address information on a bulk basis.

(2) Nothing in paragraph (d)(1) of this section shall preclude local exchange carriers from providing to an interexchange carrier the billing name and address information for all customers presubscribed to that interexchange carrier.

(e)(1) All local exchange carriers providing billing name and address information shall notify their subscribers that:

(A) the subscriber's billing name and address will be disclosed, pursuant to Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, FCC 93-254, adopted May 13, 1993, whenever the subscriber uses a LEC joint use card to pay for services obtained from the telecommunications service provider, and

(B) the subscriber's billing name and address will be disclosed, pursuant to Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, FCC 93-254, adopted May 13, 1993, whenever the subscriber accepts a third party or collect call to a telephone station provided by the LEC to the subscriber.

(2) All local exchange carriers shall obtain from subscribers with local exchange carrier joint use cards who also have unlisted or unpublished telephone numbers written consent for disclosure of the billing name and address information associated with the local exchange carrier joint use card account before disclosing such information pursuant to Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, FCC 93-254, adopted May 13, 1993.

(3) Paragraphs (e)(1) and (e)(2) of this section do not apply to disclosure of billing name and address information in the circumstances described in paragraph (d)(2) of this section.

PART 69 -- ACCESS CHARGES

6. The authority citation continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154.

7. Section 69.128 is added to read as follows:

§ 69.128 Billing Name and Address

Appropriate subelements shall be established for the use of equipment or facilities that are associated with offerings of billing name and address.

8. Section 69.307(b) is redesignated Section 69.307(c), and new Section 69.307(b) is added to read as follows:

§ 69.307 General Support Facilities

* * * * *

(b) General purpose computer investment used in the provision of the billing name and address element at Section 69.128 shall be assigned to that element.

APPENDIX C

Regulation of BNA at State Level

Ameritech reports that there are no state regulations addressing BNA in its territory, but its state tariffs create customer expectations that BNA will not be disclosed. It believes disclosure would conflict with the interests of customers who have subscribed to non-publication service under state tariffs since BNA and listing information are usually identical. It argues that mandated BNA disclosure should be consistent with these privacy interests.[1] Bell Atlantic states there are no regulations in its jurisdictions that preclude release of BNA if required by the FCC.[2] BellSouth indicates that Florida has rules restricting access to CPNI, which is deemed to include BNA in that state.[3] Washington State determined that US West can not release BNA to enhanced and information service providers, but can provide non-published BNA information to telecom companies. North Dakota, South Dakota, and Colorado deregulated billing and collection except for BNA. Like Florida, Colorado includes BNA in its definition of CPNI.[4] Pacific reports that California's privacy laws are the strictest in the nation and restrict disclosure of residential customer information except for certain specified purposes.[5]

[1] Ameritech Comments at 7.
[2] Bell Atlantic Comments at 4.
[3] BellSouth at 2.
[4] US West Comments at 18-21.
[5] Pacific Comments at 2; California Comments at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-185

In the Matter of

Amendment of Section 73.202(b), RM-8249
Table of Allotments,
FM Broadcast Stations.
(Estes Park, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1993; Released: July 8, 1993

Comment Date: August 30, 1993
Reply Comment Date: September 14, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Hambric Associates ("petitioner") requesting the allotment of Channel 271A to Estes Park, Colorado, as that community's first local FM service. Petitioner expressed its intention to apply for Channel 271A if it is allotted to Estes Park, as requested.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 271A to Estes Park, Colorado, since it could provide the community with its first local FM service. Channel 271A can be allotted to Estes Park in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.6 kilometers (2.3 miles) west of the community.[2]

3. Accordingly, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Estes Park, Colorado	--	271A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 30, 1993,** and reply comments on or before **September 14, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Hambric Associates
Attn: M. R. Hambric
10976 E. Crestline Place
Englewood, CO 80111

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although petitioner's request was signed and its address provided, it failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of its knowledge. While a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the commenting or petitioning party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] Coordinates used for Channel 271A are 40-22-22 and 105-33-45. The site restriction is required to avoid a short spacing to the licensed site of Station KTRR(FM), Channel 273C2, Loveland, Colorado, at coordinates 40-27-19 and 104-55-25.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-183

In the Matter of

Amendment of Section 73.202(b), RM-8276
Table of Allotments,
FM Broadcast Stations.
(Sun Valley, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1993; Released: July 8, 1993

Comment Date: August 30, 1993
Reply Comment Date: September 14, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Sun Valley Fine Arts Broadcasting ("petitioner"), requesting the allotment of Channel 298C to Sun Valley, Idaho, as that community's third local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 298C to Sun Valley, Idaho, as an additional local FM service. Channel 298C can be allotted to Sun Valley in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Sun Valley, Idaho	237C3, 279C	237C3, 279C 298C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 30, 1993,** and reply comments on or before **September 14, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 298C at Sun Valley are North Latitude 43-41-48 and West Longitude 114-21-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-182

In the Matter of

Amendment of Section 73.202(b), RM-8269
Table of Allotments,
FM Broadcast Stations.
(Columbiana, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1993; Released: July 8, 1993

Comment Date: August 30, 1993
Reply Comment Date: September 14, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Columbiana Broadcasting Company ("petitioner") requesting the allotment of FM Channel 268A to Columbiana, Alabama, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 268A if allotted to Columbiana, as requested.

2. A staff review of the proposal reveals that Channel 268A can be allotted to Columbiana in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.8 kilometers (2.4 miles) west of the community.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 268A to Columbiana, Alabama, as an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Columbiana, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Columbiana, Alabama	--	268A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 30, 1993,** and reply comments on or before **September 14, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Hayes, Jr., Esq.
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, VA 22553

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the (Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 268A are 33-10-04 and 86-38-45. The site restriction is required to avoid a short spacing to the licensed site of Station WKHX-FM, Channel 268C, Marietta, Georgia, at coordinates 33-48-27 and 84-20-26, as well as to the licensed site of Station WHHY-FM, Channel 270C, Montgomery, Alabama, at coordinates 32-24-11 and 86-11-48.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-129

In the Matter of

Amendment of Section 73.202(b),	RM-7084
Table of Allotments,	RM-7290
FM Broadcast Stations.	RM-7413
(*Columbia and Dothan, Alabama,* Graceville, Santa Rosa Beach and Springfield, Florida)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1993; Released: July 8, 1993

By the Chief, Allocations Branch:

1. In a previously adopted *First Report and Order* in this proceeding, 7 FCC Rcd 2112 (1992), we deferred action on two proposals. Broadcast Associates, Inc. ("BAI"), permittee of Station WESP(FM), Channel 273A, Dothan, Alabama, filed a petition requesting the substitution of Channel 273C3 for Channel 273A at Dothan and modification of its construction permit for Station WESP(FM) to specify Channel 273C3 (RM-7290), and Columbia Broadcasting Group ("CBG") filed a counterproposal seeking the allotment of Channel 271A to Columbia, Alabama, as that community's first local service (RM-7413).[1] CBG and BAI filed reply comments.[2]

2. CBG in its counterproposal notes that its proposal to allot Channel 271A to Columbia is mutually exclusive with BAI's proposal to substitute Channel 273C3 for Channel 273A at Dothan. CBG contends that pursuant to *Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982), the upgrade sought by BAI qualifies for the lowest allotment priority, since it will not provide a first local or second aural service. CBG states that its proposal should be preferred because it will provide a first local service to Columbia, Alabama, whereas, BAI proposes to upgrade one of four commercial FM channels allotted to Dothan, two of which already offer wide area service. CBG also states that Columbia is an incorporated community with a population of 881[3] with a Mayor and city council. Columbia has its own high school, post office, hydroelectric power plant, a nuclear power plant, manufacturing plant for women's clothes, sports clothing, and fishing equipment. CBG states that it will apply for Channel 271A at Columbia, if allotted. CBG in reply comments reaffirms its interest in the allotment of Channel 271A to Columbia.

3. BAI in its comments supports the opportunity to upgrade Station WESP(FM), Dothan, Alabama. BAI agrees to reimburse the permittee for Channel 271A at Graceville, Florida, who must move to Channel 269A to accommodate its upgrade.

4. In response to CBG's counterproposal BAI performed a channel search to find an alternate channel for allotment to Columbia. BAI contends that Channel 221A can be allotted to Columbia instead of Channel 271A. CBG notes that Channel 221A can be allotted to Columbia provided Channel 299A is substituted for Channel 221A, Station WAZE(FM), Dawson, Georgia, as proposed in MM Docket No. 90-475.[4] BAI argues that the allotment to Columbia and the upgrade at Dothan can be accommodated by consolidating the Dawson and Sasser petitions into this proceeding. BAI notes that the Commission generally consolidates proposals that are filed before the relevant comment date in the docketed proceeding if they are interrelated and will assist the Commission in resolving mutually exclusive proceedings, citing *Churubusco, Indiana, et al.,* 2 FCC Rcd 6505 (1987), *recon. denied,* 4 FCC Rcd 5045 (1989), *review denied,* 5 FCC Rcd 916 (1990).

5. Our analysis indicates that the mutual exclusivity between the Columbia and Dothan proposals can be resolved by the allotment of Channel 221A to Columbia, Alabama. Since the parties can be accommodated in separate proceedings, consolidation is not necessary. In a *Report and Order* in MM Docket No. 90-475 adopted simultaneously with this proceeding, alternate Channel 251A has been allotted to Dawson, thereby removing the mutual exclusivity between the Dawson and Sasser proposals. The deletion of Channel 221A at Dawson allows for the use of Channel 221A at Columbia, Alabama. The allotment of Channel 221A to Columbia will provide that community with its first local service, and allow Channel 273C3 to be substituted for Channel 273A at Dothan. Because channels are available to satisfy each expression of interest, a comparative analysis is unnecessary.

6. In view of the above information, we believe the public interest would be served by allotting Channel 221A to Columbia, Alabama, as that community's first local service, and by substituting Channel 273C3 for Channel 273A at Dothan, Alabama. As stated in the *Notice,* Chan-

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[1] BAI's proposal also requested the substitution of Channel 269A for Channel 271A at Graceville. The *First Report and Order* granted the substituted Channel 271C3 for Channel 272A at Santa Rosa Beach, Florida, and modified the license for Station WWAV(FM) accordingly; substituted Channel 269A for Channel 271A at Graceville, Florida, and modified the construction permit for Station WYDA(FM) accordingly; and substituted Channel 267A for Channel 270A at Springfield, Florida, and modified the construction permit for Station WYOO accordingly, to accommodate the upgrade at Santa Rosa Beach.

[2] After the record closed, CBG filed a motion to strike BAI's reply comments, and EME Communications ("EME") filed comments and an erratum in support of CBG's motion. In its reply comments, BAI suggests that the resolution of another proceeding (RM-7280) would make available an alternate channel to resolve this proceeding. CBG characterizes BAI's suggestion as an untimely counterproposal. We disagree. BAI has merely proposed the use of an alternate channel for allotment to Columbia. Therefore, we need not consider these comments.

[3] Population figures are taken from the 1980 U.S. Census. The 1990 U.S. Census reflects a population of 922 persons.

[4] In MM Docket No. 90-475, Dawson Broadcasting Company requested the substitution of Channel 299A for Channel 221A at Dawson, Georgia. That proposal is mutually exclusive with a proposal to allot Channel 299C3 to Sasser, Georgia. *See Notice of Proposed Rule Making,* 5 FCC Rcd 6299 (1990).

nel 273C3 can be substituted for Channel 273A at Dothan in compliance with the Commission's minimum distance separation requirements with a site restriction 5.9 kilometers (3.7 miles) east[5] in order to avoid a short-spacing to Station WAMI(FM), Channel 272A, Opp, Alabama. Channel 221A can be allotted to Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction 6.1 kilometers (3.4 miles) east[6] in order to avoid a short-spacing to Station WLWI(FM), Channel 222C, Montgomery, Alabama. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WESP(FM) to specify operation on Channel 273C3 at Dothan, Alabama.

7. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio,* 8 FCC 2d 159 (1967). BAI has stated its intention to reimburse the permittee of Graceville, Florida, for its reasonable costs in changing frequency. As stated in the *First Report and Order* BAI will be required to share reimbursement costs with Emerald Coast Communications, Inc., licensee of Station WWAV(FM), Santa Rosa Beach, Florida.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 23, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Columbia, Alabama	221A
Dothan, Alabama	273C3

9. The window period for filing applications for Columbia, Alabama, will open on **August 24, 1993,** and close **September 23, 1993**.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Broadcast Associates, Inc., for Station WESP(FM), Dothan, Alabama, IS MODIFIED, to specify operation on Channel 273C3 in lieu of Channel 273A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] The coordinates for Channel 273C3 at Dothan are North Latitude 31-14-40 and West Longitude 85-20-10.
[6] The coordinates for Channel 221A at Columbia are North Latitude 31-17-00 and West Longitude 85-03-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-306

In the Matter of

Amendment of Section 73.202(b), RM-7824
Table of Allotments,
FM Broadcast Stations.
(Safford, Arizona)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1993; Released: July 8, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 7 FCC Rcd 740 (1992), filed by Wick Communications Co. ("Wick").[1] The *Report and Order* granted a petition for rule making filed on behalf of P&M Broadcasting, Inc. ("P&M"), licensee of Station KXKQ(FM), which proposed the substitution of Channel 231C for Channel 231C1 at Safford, Arizona.[2] No comments were filed in response to Wick's petition for reconsideration.

2. *Background.* This proceeding originated with a petition for rule making filed by P&M requesting the substitution of Channel 231C for Channel 231C1 and modification of its license to specify operation on the higher powered channel. In response to that request, the Commission issued a *Notice of Proposed Rule Making ("Notice")*, 6 FCC Rcd 6056 (1991), requesting comments on the proposed upgrade. P&M filed comments in support of the upgrade, reaffirming interest in the channel. No other comments were received in response to the *Notice*. The *Report and Order* granted P&M's petition, substituted Channel 231C for Channel 231C1 and modified Station KXKQ(FM)'s license to specify operation on the higher powered channel.

3. Wick's petition for reconsideration asserts that the requested modification should not have been made, based on the premise that P&M had filed for bankruptcy at the time the substitution of channels was requested. Wick states that due to P&M's financial condition at the time the petition for rule making was filed, P&M did not have the requisite interest and ability to implement the requested change. Wick alleges that P&M's failure to notify the Commission of its status was a deliberate misrepresentation and the action taken should be vacated for reasons of P&M's lack of candor before the Commission. For these reasons, Wick asserts that the Allocations Branch should vacate its *Report and Order*.

4. *Discussion.* We will dismiss Wick's petition for reconsideration for two reasons. First, pursuant to Section 1.429 of the Commission's rules, Wick should have filed its objection during the pendency of the rulemaking proceeding, as the information regarding P&M's bankruptcy status was available at that time. Second, the petition is now moot because the transfers of ownership in KXKQ(FM) were approved by the Commission, the allegations made by Wick have been addressed by the Audio Services Division, and the current licensee has made a statement of continuing interest in the upgrade.

5. Pursuant to Section 1.429(b) of the Commission's rules, a petition for reconsideration will not be granted unless the facts relied on relate to events which occurred or circumstances which have changed since the last opportunity to present them to the Commission; the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not, through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or the Commission determines that consideration of the facts relied on is required in the public interest. Wick has not alleged that the status of P&M broadcasting has changed from the time the *Notice* was issued to the time the petition for reconsideration was filed, nor has Wick alleged that information relating to P&M's bankruptcy status was unavailable during the period when comments were specifically solicited by the Commission's staff. Wick also fails to allege any public interest benefit to the acceptance of the petition or its accompanying information relating to P&M's bankruptcy and related transfers. Therefore, Wick's petition for reconsideration will be dismissed as untimely pursuant to Section 1.429 of the Commission's rules.

6. Even if we were to consider the merits of Wick's petition for reconsideration, we would not grant the relief requested. Wick asserts that P&M's failure to disclose its status constitutes a willful misrepresentation to the Commission. Concurrent with its filing a petition for reconsideration in the present case, Wick filed an informal objection to the license renewal application on file for KXKQ(FM). Wick's allegations in that proceeding are similar to those in its present petition. The Audio Services Division ("ASD") denied Wick's informal objection by letter. *See* Letter from Chief, Audio Services Division to Marissa Repp, counsel to Wick Communications and B. Jay Baraff, counsel to McMurray Communications (December 17, 1992). The ASD letter stated that "[w]hile we do not grant license renewals to stations controlled by a temporary party, such as a receiver or trustee in bankruptcy, bankruptcy is not a renewal impediment if the station continues to be controlled by the existing licensee as a debtor-in-possession. During the period of time relevant to the allegation in the present case, KXKG (sic) was controlled by a debtor-in-possession rather than by a trustee or receiver. Thus, there would have been no rea-

[1] Public notice of the filing of Wick's petition was given on March 27, 1992, Report No. 1881.
[2] The Commission consented to a transfer of the license of KXKQ(FM) from the successor in interest of P&M Broadcasting to McMurray Communications on December 17, 1992.

son for P&M to conceal its bankruptcy status from the Commission." The ASD noted that the Commission had approved both the involuntary transfer from P&M to the receiver, and approved the voluntary transfer from the receiver to the current licensee, McMurray Communications. The letter further stated that "[w]e find that P&M's failure to notify the Commission of its status as a debtor-in-possession, while an error, does not rise to a level where it would call into question the (sic) P&M's character qualifications or raise any other substantial and material question of fact." The ASD then dismissed Wick's informal objection with respect to the license renewal application. We believe that the ASD thoroughly addressed Wick's allegations relating to P&M's bankruptcy status, and therefore, to the extent that Wick's petition relies on those allegations, the petition is now moot.

7. Wick also asserts that P&M Broadcasting could not have held the requisite intent to proceed with the upgrade because of its financial status, and therefore its ability to implement the upgrade. A statement of continuing interest is required by the Commission before a change in the Table of Allotments will be made. Such a statement must be made in response to a Notice of Proposed Rule Making, and in subsequent comments to a proceeding.[3] Although the Commission encourages full participation by all parties to a proceeding, once a grant has been made, a proponent in such a proceeding is generally not obligated to reply to a petition for reconsideration, or to file subsequent statements of continuing interest beyond the issuance of a Report and Order.[4] P&M Broadcasting made all of the requisite statements of interest in the proposed upgrade in the response to the *Notice* issued in this proceeding. However, in an effort to clarify the intentions of the new licensee of KXKQ(FM), the Allocations Branch requested McMurray Communications to make such a statement.[5] McMurray Communications responded affirmatively that if the Commission upholds the grant, it will apply for the new channel and if the application is granted, it will implement its upgrade.[6] Therefore, to the extent that Wick alleged that the licensee was financially incapable of effectuating the upgrade, that issue is now moot. We believe it is in the public interest to uphold our earlier grant to KXKQ(FM) for the increase in power and resulting service improvement.

8. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by Wick Communications IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[3] *See Tallahassee, Florida, et al.*, MM Docket 87-114, 3 FCC Rcd 5542 (1988) "Broadcast frequencies are allotted to communities in response to a stated intention to apply for the channel. Absent such an expression of interest, the Commission generally refrains from allotting a channel. *See also, e.g., Lopez and Dushore, Pennsylvania*, MM Docket 89-299, 7 FCC Rcd 854 (1992), *Murray, Kentucky*, 3 FCC Rcd 3016 (1988) and *Pine, Arizona*, 3 FCC Rcd 1010 (1988).

[4] We caution, however, that failure to respond or to object to a petition for reconsideration which specifically requests the deletion of a vacant allotment has, in certain situations, been interpreted to be an abandonment of the expression of interest. *See Oakdale and Campti, Louisiana*, MM Docket 90-594, 7 FCC Rcd 7600 (1992).

[5] *See* Letter from the Chief, Allocations Branch, to B. Jay Baraff, counsel to McMurray Communications (May 12, 1993).

[6] *See* Comments from Shainis & Peltzman, Counsel for McMurray Communications (June 8, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-84

In the Matter of

Amendment of Section 73.202(b), RM-8194
Table of Allotments,
FM Broadcast Stations.
(Asbury, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1993; Released: July 8, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 2143 (1993), issued in response to a petition filed by William Bruce Wachter ("Wachter"), proposing the substitution of Channel 278C3 for Channel 278A at Asbury, Missouri.[1] Wachter also requested modification of his construction permit for Station KWXD, Channel 278A, to specify operation on Channel 278C3. Wachter filed comments in which he reaffirmed his interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 278C3 for Channel 278A at Asbury since it would provide wide coverage area service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at Wachter's specified site.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 23, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Asbury, Missouri	278C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KWXD, Asbury, Missouri, IS MODIFIED to specify operation on Channel 278C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, William Bruce Wachter and Innovative Broadcasting Corporation, permittee of Station KWXD, are required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The permitee of Station KWXD is now Innovative Broadcasting Corporation, a corporation wholly-owned by Wachter, pursuant to an application (File No. BAPH-930325GJ) for assignment of construction permit, which was granted and consummated on May 12, 1993.

[2] The coordinates for Channel 278C3 at Asbury are 37-23-44 and 94-40-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-543

In re Applications of

MEDIA WEST BROADCAST GROUP, INC.	File No. BPH-871110MF
RIO AMERICANO COMMUNICATIONS CORP.	File No. BPH-871110MM
OLYMPIC BROADCASTERS, INC.	File No. BPH-871110MY
FAHLDA BROADCASTING COMPANY, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-871110NB
OLD SACRAMENTO BROADCASTING CO. INC.	File No. BPH-871110NJ
JAM FM LIMITED PARTNERSHIP	File No. BPH-871110NL
JACK L. POWELL	File No. BPH-871110NM
GEORGE K. FUNG	File No. BPH-871110NU

For Construction Permit for a New FM Station on Channel 278A in Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1993; Released: July 8, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. The Board has before it the "Motion For Leave To File Suggestion For Briefing," filed June 7, 1993 by Fahlda Broadcasting Co., requesting the Board to invite a supplemental briefing in the wake of the Commission's response, in *Media West Broadcast Group, Inc.*, FCC 93-265, released May 25, 1993, to the Board's prior certification to the full Commission, of two policy questions pregnant in this proceeding, *see Lizardo-Franich Partnership*, 7 FCC Rcd 6256 (Rev. Bd. 1992). So far as the Board is aware, no other party has responded to Fahlda's motion.

2. The Board finds that, inasmuch as the Commission's response to our certification is clear and definitive on its face, supplemental pleadings are unnecessary for the resolution of this pending comparative case.[1]

3. ACCORDINGLY, IT IS ORDERED, That the Motion For Leave To File Suggestion For Briefing, filed by Fahlda Broadcasting Company, A California Limited Partnership on June 7, 1993 IS DENIED; and that its Suggestion For Briefing filed on the same date IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[1] Appended to Fahlda's motion is a "Suggestion For Briefing," wherein Fahlda interposes our recent decision in *Gloria Bell Byrd*, 7 FCC Rcd 7976 (Rev. Bd. 1993) (applications for review pending). Apart from being unauthorized, *see* 47 CFR §§ 1.277; 1.279, the appended pleading is moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAN AMERICAN
SATELLITE CORPORATION,
Complainant,

v. File No. E-88-62

COMMUNICATIONS
SATELLITE CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1993; Released: July 7, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Pan American Satellite Corporation (PAS) filed a Request for Investigation (Complaint) on March 25, 1988, bringing "additional information" to the Commission's attention concerning an earlier formal complaint brought by PAS against Communications Satellite Corporation (Comsat) (File No. E-85-12).[1] PAS concluded that considerably more lobbying occurred for INTELSAT in 1987 than was reported to the Commission and that Comsat was not treating its lobbying expenses and those of INTELSAT as required by the *Bureau Order*. The Common Carrier Bureau (Bureau) decided that the Request raised issues which could best be resolved in a formal complaint proceeding, and treated the pleading accordingly.[2] For the reasons which follow, we deny the Request for Investigation.

II. BACKGROUND

2. In its original complaint on lobbying issues (File No. E-85-12), PAS contended that following the November 28, 1984 Presidential Determination of President Ronald Reagan,[3] which declared that separate international communications satellite systems were in the public interest, Comsat and INTELSAT "launched a major lobbying effort in response to the presidential determination to prevent implementation of a policy supporting separate satellite systems."[4] That complaint urged the Commission to prohibit payments by Comsat to INTELSAT for these lobbying expenses and to find the inclusion of these expenses in Comsat's jurisdictional operating expenses unreasonable and unjustified. The *Bureau Order* (affirmed by the Commission) rejected PAS' argument that Comsat should be prohibited from making payments to INTELSAT for its share of the expenses INTELSAT incurred in lobbying against the establishment of separate satellite systems. However, it ordered Comsat to charge to its non-jurisdictional accounts all expenses for lobbying on this issue incurred either on its own behalf or as a U.S. signatory to INTELSAT after the Presidential Determination was issued. In addition, it ordered Comsat to submit quarterly reports to the Commission detailing "all identifiable expenditures for the purpose of lobbying on the issue of separate international satellite systems."[5]

III. DISCUSSION

A. Lobbying Expenditures

1. The Applicable Standard

Contentions of the Parties

3. PAS argues that Comsat's quarterly reports of these lobbying expenses, filed at the Commission as directed by the *Bureau Order*, materially under-reported the lobbying expenses by Comsat and by INTELSAT, for which Comsat pays a percentage share. PAS bases its contention principally on reports by three INTELSAT lobbyists, filed with Congress and the United States Department of Justice (DOJ) under, respectively, the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 ("FRLA"), and the Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 ("FARA"). For the year 1987, which is the period for which PAS supplied data with its Complaint, the lobbyists' reports to Congress under FRLA showed lobbying expenses totalling $21,083.[6] Reports by the same three firms filed with the Department of Justice under FARA showed total receipts by agents of a foreign principal from that principal (INTELSAT) of $132,454.[7] Comsat's reports to the Commission for the same period showed lobbying expenditures by INTELSAT of only $6,724, of which Comsat's contractually obligated share was twenty-six

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[1] Pan American Satellite Corp. v. Communications Satellite Corporation, Mimeo No. 4988, released June 6, 1985 (hereinafter *Bureau Order), recon. denied*, 1 FCC Rcd 111 (1986) (hereinafter *Commission Order)*.

[2] *Notice of Formal Complaint*, File No. E-88-2, dated April 11, 1988. Other pleadings filed in this proceeding include: Comsat Opposition to Request for Investigation; PAS Reply to Opposition; Comsat Statement in Satisfaction (or Alternatively, Answer to Complaint); PAS Reply to Answer; PAS Letter/Supplement to Complaint (October 7, 1988); Comsat Letter/Response to Supplement (October 17, 1988); PAS Letter/Further Supplement with Revised Exhibit A (June 9, 1989); Comsat Letter/Response to Further Supplement (June 30, 1989); PAS Further Letter (November 5, 1990); Comsat Letter/Reply to November 5, 1990 Letter (November 8, 1990); PAS Further Letter (November 14, 1990); Comsat Letter Response (November 28, 1990); PAS Further Letter (December 7, 1990); Comsat Letter/ Reply (December 26, 1990).

[3] Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (1984), pursuant to the Communications Satellite Act of 1962, as amended, 47 U.S.C. §§ 701(d), 721(a).

[4] *Bureau Order* at 2.

[5] *Id.* at 8.

[6] See Appendix for the amounts contained in the various reports.

[7] Reports filed under FARA show both lobbying and non-lobbying expenses.

percent (26%), or $1,748.[8] PAS maintains that Comsat should be required to explain these "significant discrepancies."[9] PAS argues that Comsat either "deliberately erred on the side of underinclusion, failing to report INTELSAT expenditures (known to Comsat) that might well fall within the terms of the *Bureau Order;* or ... chose to remain ignorant in the face of evidence that INTELSAT was likely underreporting to Comsat (and hence to the FCC) its lobbying expenditures on separate system matters."[10]

4. PAS states that the under-reporting of lobbying expenditures stems in large part from the conscious decision by Comsat to report to the Commission the same figures reported by INTELSAT's lobbyists to Congress under the FRLA. PAS maintains that this standard is too narrow and necessarily leads to under-reporting. By limiting its data to the FRLA-based information which INTELSAT gathers from its lobbyists, Comsat omits a universe of information about political activity affecting Congressional legislation which does not fall within the FRLA definition of lobbying, as well as activities of INTELSAT employees engaged in influencing public officials. PAS contends that the FARA reports indicate that INTELSAT lobbyists participated in numerous conferences and meetings about separate system coordination.[11] It asserts that the figures submitted by Comsat are not credible in light of this evidence of extensive lobbying by INTELSAT. Indeed, according to PAS, the FARA reports show that virtually the entire amount INTELSAT paid those lobbyists in 1987 ($132,454) was for work on separate system issues.

5. PAS maintains that the issue is simply whether Comsat or INTELSAT expenditures, regardless of whether or not they are reportable under FRLA (as construed by the Supreme Court in *U.S. v. Harriss*, 347 U.S. 612, 74 Sup. Ct. 808 (1954), represent reportable lobbying expenses. PAS contends that Comsat's reliance on FRLA and *U.S. v. Harriss* is erroneous, because the Court's analysis of FRLA in that criminal case was determined by its judicial obligation to interpret the statute in a manner that would preserve its constitutionality, if possible. For this reason, the Court defined the term lobbying narrowly to sustain the act against a charge that it was unconstitutionally vague. PAS asks this Commission to take a broader view in its regulatory outlook. PAS believes that Comsat is hiding behind the Court's ruling in *U.S. v. Harriss* to avoid giving full and open meaning to the definition of lobbying developed by the Commission in its earlier orders in this case and prior to that in *Reporting Lobbying Expenses*, 92 FCC 2d 153 (1982). PAS argues that *U.S. v. Harriss* has no relevance to the Commission's reporting requirements for carriers. Moreover, it asserts that whereas neither the *Harriss* case nor the FRLA was mentioned in the *Bureau Order*, the relevance of FARA reports was specifically recognized in that order.

6. Comsat maintains that it did not deliberately or negligently under-report INTELSAT's lobbying on separate systems during 1987. First, it argues that in its view, neither it nor INTELSAT undertook any reportable lobbying specifically on the subject of separate international satellite systems after 1985, the year in which Congress passed the Foreign Relations Authorizations Act of 1985, because the issue was "resolved legislatively" when that 1985 statute was enacted. Comsat states that INTELSAT did sponsor some lobbying activity in response to a PAS campaign in connection with the 1987 omnibus trade bills.[12] However, Comsat explains that INTELSAT was not seeking a change in U.S. separate systems policy. Its efforts were directed at changing report language, not the legislation itself. Therefore, argues Comsat, the actions of INTELSAT were "purely defensive," since the language in question was aimed not at separate systems, but at INTELSAT.[13] Comsat believes that the *Bureau Order* did not require that it report any of INTELSAT's activities. Notwithstanding, "out of an abundance of caution," Comsat reported all INTELSAT-sponsored lobbying on trade legislation during 1987, as reported to it by INTELSAT.[14]

7. Second, Comsat asserts that even if INTELSAT's activities consisted of lobbying on the issue of separate satellite systems, the pertinent information is that provided to Congress pursuant to FRLA. Comsat maintains that the FARA reports, relied on by PAS, are irrelevant since they include all receipts by agents of foreign principals, whereas FRLA reports include only receipts attributable to lobbying activities. According to Comsat, the FRLA, as construed in *U.S. v. Harriss, supra,* defines "lobbying in its commonly accepted sense." Comsat points out that when the Commission adopted its definition of lobbying, it specifically declined to adopt a definition that would go beyond that "commonly accepted meaning."[15] Moreover, Comsat maintains, it should not be obligated to go beyond the information contained in a lobbying firm's FRLA reports. Comsat claims if the Commission were to order it to do so in preparing its quarterly reports, it would be allowing and approving the more detailed reporting that the Commission found was neither necessary nor cost-justified in *Reporting Lobbying Expenses, supra.*[16] However, since the *Bureau Order* indicated that Comsat's reports should include staff contacts as well as contacts with members of Congress, and the report of one of INTELSAT's lobbyists excluded staff con-

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[8] In its opposition Comsat submitted amended figures totaling $21,719, of which Comsat's share was $5,647. Comsat Opposition at 5-6.

[9] Complaint at 17.

[10] *Id.* at 2.

[11] For example, the FARA report of Preston lobbyist William N. Myhre submitted to the DOJ on April 9, 1987, stated that the firm undertook "activities" on behalf on INTELSAT, specifically, "the firm has contacted Members and Committees of the Congress and their staffs and provided them with information about INTELSAT and its procedure for coordinating separate satellite systems..." The report stated that the firm undertook "political activities" on behalf of INTELSAT, consisting of "educational activities to inform members of the United States Congress and their staffs on the current role of INTELSAT." There followed a listing of 37 conferences, meetings, correspondence with the following representatives senators, and their staffs. Complaint at 6-7, Ex. D at 18-21.

[12] Comsat Opposition at 4-5.

[13] *Ibid.*

[14] *Ibid.*

[15] *Reporting Lobbying Expenses, supra,* 92 FCC 2d 153 at 156.

[16] Comsat Answer at 3-5.

tacts, Comsat requested a special report covering these lobbying expenses,[17] and included the data in its revised figures.

8. Comsat asserts that the PAS contention that because the Commission referred to FARA in its orders dealing with PAS' earlier complaint, FARA is the appropriate statute for defining lobbying, is erroneous. The Commission mentioned FARA only because PAS had relied on FARA statements in that complaint, says Comsat, but it did not say that FARA and FCC requirements were co-extensive. Indeed, they could not be, asserts Comsat, because lobbyists for Comsat, which is not a foreign entity, do not file FARA statements. Comsat contends that FARA reports, which include all activities on behalf of foreign principals, include much more than lobbying expenses.[18]

9. To the PAS charge that an INTELSAT employee was directly involved in lobbying on separate satellite systems in 1987, Comsat asserts that INTELSAT has affirmed that the employee did not participate in lobbying on the separate systems issue in 1987, even if one assumes *arguendo* that trade legislation dealt with the issue of separate systems. The employee did on a few occasions support INTELSAT's lobbyists at meetings with members of Congress and their staffs. The employee was not acting as a lobbyist in those sessions, but merely as a "technical expert or resource person" on the matters under discussion. This, says Comsat, is common practice, but does not convert that practice into lobbying. In any event, maintains Comsat, the case of *U.S. v. Harriss, supra*, makes clear that under FRLA, an employee would be considered a lobbyist only if that person devoted a "substantial part" of his or her time to influencing legislation. Comsat states that this employee did not. Comsat believes, therefore, that the activities of this INTELSAT employee cannot be treated as lobbying for the purposes of Comsat's reporting requirements to the Commission.[19]

Discussion

10. We hold that Comsat was reasonable in looking originally to FRLA data for its reportable lobbying expenses. The Commission itself rejected a request for full-blown reporting of both direct and indirect costs of lobbying in *Reporting Lobbying Expenses, supra*. It is significant that the Commission there rejected a request which would require carriers to submit far more detailed and inclusive lobbying reports. The Commission found that lobbying expenses "have had an insignificant impact on interstate rates"[20] and that even if the Commission perceived a need for the volume of information sought by the petitioner, it was not convinced that "the value of the information gained would be worth the cost to the ratepayers of obtaining it."[21] We find that reasoning equally applicable here. The FARA reports, which include *all* receipts by an agent of a foreign principal, obviously include more than just lobbying expenses. PAS has submitted no proof to support its contentions that virtually the entire amount INTELSAT paid its agents in 1987 was for work on the issue of separate satellite systems or that all work on the issue of separate satellite systems consisted of lobbying.[22] Although the Bureau rejected Comsat's contention in the underlying complaint (E-85-12) that its activities were educational as opposed to lobbying, it recognized that Comsat had education obligations with respect to Congress. A cursory reading of the FARA reports submitted by PAS with the instant complaint suggest that some of INTELSAT's activities in 1987 were indeed educational.[23] The lobbyists themselves have made an initial decision as to which of their receipts fall under the commonly accepted meaning of lobbying. It would be unduly burdensome to require Comsat to reallocate the FARA figures of INTELSAT's agents among such categories as direct and indirect expenses, educational and lobbying activities, and lobbying on the issue of separate satellite systems or on other issues. Comsat must, of course, supplement the FRLA data with appropriate figures for any category of expenses known to be omitted from the FRLA reports, as it has done with the staff contacts excluded by one lobbying firm.[24] Finally, we believe that to the extent certain lobbying expenses arguably omitted from the FRLA reports were not offset by lobbying expenses on other issues included in the FRLA reports, the final effect on the ratepayers would be *de minimis*. We note that the *Bureau Order* directed Comsat to report "all *identifiable* lobbying expenditures for the purpose of lobbying on the issue of separate international satellite systems."[25] Accordingly, we find that the lobbying expenses reported by Comsat, consisting of the FRLA report data, as supplemented by additional information developed to include the cost of staff contacts, meet the reporting requirements of the *Bureau Order*.

2. Comsat's Diligence

Contentions of the Parties

11. PAS also argues that even if Comsat's definition of lobbying is correct, Comsat has been "seriously negligent" in fulfilling its reporting obligations, and its proffer of inadvertence should not be accepted. PAS points out that the revised total for lobbying expenses, $21,719, is more than triple the amount originally reported. PAS argues that the Commission should not accept Comsat's attempt to "trivialize this proceeding" by accepting its defense that the discrepancy is *de minimis*.[26] PAS contends that

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[17] In its Reply to Opposition PAS faulted Comsat for not asking INTELSAT's other two lobbying firms to report staff contacts. Comsat explains that their FRLA reports included staff contacts, and therefore there was no need to ask for special reports. Comsat Answer at 6-7.

[18] Comsat Answer at 5.

[19] Comsat Opposition at 9-10.

[20] *Reporting Lobbying Expenses*, 92 FCC 2d at 157.

[21] *Id.* at 156.

[22] Since Comsat treated all lobbying reported under FRLA as lobbying on the issue of separate satellite systems, we will not reach the issue of whether lobbying on trade legislation in 1987 was indeed lobbying on the issue of separate satellite systems.

[23] See, for example, the Preston report referred to in n.11 which stated that the firm engaged in educational activities designed to inform Congress about the current role of INTELSAT.

[24] We are satisfied that any lobbying activities of the INTELSAT employee who accompanied the lobbying firms in their contacts with Congress were minimal and can be considered indirect costs of lobbying which need not be reported here.

[25] *Bureau Order* at ¶19.

[26] PAS observes that the *Bureau Order* does not recognize any *de minimis* exception. PAS also states that there is a value in "ensuring the integrity of the Commission's processes." PAS Reply to Opposition at 11, n.9.

Comsat's efforts to gather the data needed to file its Commission reports were so generally unsuccessful as to be beyond inadvertence.[27]

12. Comsat asserts that the charge of negligent reporting is false. Comsat explains that since the *Bureau Order* was released, it has filed regular reports with the Commission.[28] For calendar year 1987, these reports dealt with INTELSAT's activities and were necessarily based on information obtained from INTELSAT, which, in turn, relied on information from its lobbying firms. In all cases, Comsat states, its intention has been to provide the Commission with the same expenditures provided to Congress pursuant to FRLA. it "tried to err on the side of over-reporting expenditures," and it treated its reporting obligations with great seriousness.[29] Comsat admits that errors were made, but contends that they were inconsequential and were promptly corrected.[30] Comsat's initial reports to the Commission understated INTELSAT's lobbying expenditures mainly because certain expenses were not reported to it by INTELSAT.[31] Other expenses were not originally included by one of the lobbying firms because it concluded that the expenses were not reportable under FRLA.[32]

13. After Comsat discovered that its 1987 reports to the Commission did not match the lobbying firms' reports to Congress, Comsat investigated the causes for the discrepancies and submitted amended reports to the Commission. In addition, it has taken the corrective measure of crediting its ratepayer accounts for 1988 to the extent of all previously unreported lobbying expenses. Furthermore, Comsat asserts that it has put new procedures in place so that these errors will not occur in the future. It states that it has contacted the lobbying firms directly to ensure that they tighten their internal reporting procedures, and has asked INTELSAT to send Comsat copies of its lobbyists' FRLA reports upon receipt so that Comsat can use them as the basis for its reports to the Commission. Moreover, Comsat states that it has informed the lobbying firms that they must report staff contacts as well as contacts with members of Congress. These new procedures, Comsat believes, should make it possible in the future to report all data on a timely basis.[33]

Discussion

14. We are not convinced that the discrepancies revealed in Comsat's reports on the issue of separate satellite systems were significant enough to require further Commission investigation. To the extent that PAS sought to ensure that Comsat files more accurate reports in the future, PAS has obtained its goal. We reject PAS' conclusion that Comsat's reporting was willfully negligent. Comsat instituted a procedure whereby it requested information from INTELSAT, prepared a report for the Commission, confirmed the data with INTELSAT, and submitted a timely report to the Commission.[34] Since Comsat itself was not engaged in lobbying activities on the issue of separate satellite systems, it was not negligent at this point in relying on the data submitted by INTELSAT rather than obtaining information directly from the lobbyists employed by INTELSAT. Comsat had a reasonable expectation that the lobbying firms, which were familiar with their reporting requirements, would supply INTELSAT with timely and accurate information, which in turn would be relayed accurately and promptly by INTELSAT for use in Comsat's reports to the Commission.

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[27] PAS Reply to Opposition at 11.

[28] The *Bureau Order* directed Comsat to report to the Commission on a quarterly basis all identifiable expenditures for lobbying "on the issue of separate international satellite systems," whether incurred by Comsat on its own behalf or Comsat's share of INTELSAT's expenses. *Bureau Order* at Paras. 19-20.

[29] Comsat Opposition at 4.

[30] *Id.* at 3-4.

[31] For example, with regard to Powell, there was a reporting error by Comsat because Powell informed INTELSAT that the figure submitted in its first quarter 1987 FRLA report was inaccurate and promised to supply a corrected figure. Knowing this figure to be incorrect, INTELSAT did not report any figure to Comsat for Powell. Moreover, Powell's new FRLA reports, showing revised first quarter receipts and second quarter receipts, were never received by INTELSAT. Thus, Comsat never learned of these amounts, and did not report them to the Commission. The Bogle firm for the first three quarters of 1987 filed FLRA reports stating that no lobbying had been done. Accordingly, Comsat's reports to the Commission mentioned no such activity. However, on January 31, 1988, Bogle filed amended FRLA reports stating that there had been receipts of $9,664 for the entire year 1987. Bogle revised its reports again, having determined that the January 31, 1988, filing represented all work done for INTELSAT, not just lobbying on separate systems. Comsat's amended reports reflect the revised Powell and Bogle data. Comsat Opposition at 7-9.

[32] Preston reported only $720 spent on separate system lobbying in 1987. Although the firm's FARA reports show numerous conferences on the trade bill with members of Congress and their staffs, Powell determined that most of these conferences were not reportable under FRLA. Comsat explains that Preston's FRLA reports, "consistent with its reading of *U.S. v. Harriss, supra* (the leading case on FRLA), include only direct communications with members of Congress to influence the passage or defeat of legislation by Congress." In deference to the *Bureau Order* that indicated that lobbying expenses should include staff contacts as well as contacts with members of Congress, Comsat asked Preston to prepare a supplemental report covering staff contacts, which was done. Comsat states that its other lobbying firms included staff contacts normally, so that this additional step was necessary only as to Preston. Comsat Opposition at 6-7, Comsat Answer at 5-6.

[33] Comsat Opposition at 10. PAS filed additional data in its Reply to Comsat's Answer and in a letter of June 9, 1989, purporting to demonstrate further discrepancies in the reporting of lobbying expenses by Comsat and INTELSAT in 1988 and 1989. PAS Reply to Answer at i, 2-3, and Exhibit A. PAS asserts that this information shows that Comsat's claimed improvements in reporting procedures are not working. For example, it notes that Comsat was obliged to amend its first quarter report to include a previously unreported payment by INTELSAT to a lobbyist. Comsat, on the other hand, counters that this prompt correction is evidence of its attention to accuracy in its ongoing quarterly reporting. Comsat Letter of October 17, 1988, at 1-2. As to an alleged under-reporting of lobbying expenses for the fourth quarter of 1988 and for the first quarter of 1989, Comsat maintains that PAS continues to base its attack on the faulty premise that Comsat should be reporting FARA data. The reports under FARA were accurate, says Comsat, but only a small fraction of the expenditures reported therein were relevant to and reportable by Comsat to the Commission. It alleges that the amounts as reported are correct. Comsat Letter of June 10, 1989, at 2.

[34] See Comsat Opposition at 3-4 for a description of Comsat's original procedures.

15. Upon learning of the discrepancies between the various filings, however, Comsat investigated the discrepancies, requested special reports from the lobbyists, as needed, filed amended reports with the Commission, and took corrective actions to ensure that future reports would be timely and accurate. In addition, it credited its ratepayer accounts for the amount of lobbying expenses which were under-reported for 1987. We find that these corrective measures are an indication of Comsat's diligence and good faith in reporting its and INTELSAT's lobbying expenses on the issue of separate satellite systems as directed in the *Bureau Order*. We believe they are sufficient to ensure accurate and timely reports in the future.[35] We expect, of course, that Comsat will continue to file accurate and timely reports as directed in the *Bureau Order*. In sum, since Comsat has revised its procedures on its own, we find that no action by the Commission is required at this time.

B. Attorney Fees

16. In its Complaint, PAS requests that the Commission award PAS reasonable attorney's fees and costs in addition to any damage award or other relief. In light of prior Commission decisions, we cannot award attorney's fees or costs to PAS.[36]

IV. CONCLUSION

17. We have carefully reviewed the record before us and have found that Complainant is not entitled to damages or to any of the other relief requested, including the award of attorney fees. We hold that PAS has not identified any conduct by Comsat regarding its reporting of lobbying expenditures with which we can find any serious fault. Therefore, we will not undertake any new investigation of Comsat's conduct as PAS has asked, but rule instead that this proceeding is terminated.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208 and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208 and 209, that the above-captioned complaint filed by Pan American Satellite Corporation IS DENIED to the extent discussed here.

19. IT IS FURTHER ORDERED that Communications Satellite Corporation shall continue to file quarterly reports with the Commission as described herein and as originally required in the *Bureau Order*.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[35] We note that Comsat had to amend its first quarter 1988 report to include an amount previously unreported by one of the lobbying firms. Comsat cannot control the accuracy and timeliness of reporting by lobbyists hired by INTELSAT. It can and did, however, ensure that these reports are forwarded to Comsat and that Comsat's own reports are amended when necessary.

[36] See *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975); Allnet Communications Services, Inc. v. Bell Atlantic Telephone Co., 8 FCC Rcd 1347 (1993)

APPENDIX

SEPARATE SYSTEM LOBBYING ON BEHALF OF INTELSAT

Qtr. & Yr.	FIRM[2]	AMOUNTS REPORTED TO FCC BY COMSAT: ORIGINAL	AMOUNTS REPORTED TO FCC BY COMSAT: AMENDED	AMOUNTS REPORTED TO CONGRESS UNDER FRLA BY LOBBYISTS FOR INTELSAT: ORIGINAL	AMOUNTS REPORTED TO CONGRESS UNDER FRLA BY LOBBYISTS FOR INTELSAT: AMENDED	AMOUNTS REPORTED TO DOJ UNDER FARA BY AGENTS OF INTELSAT[1]
1-87	Powell	$ 0	$2,438[3]	$9,174[4]	$2,438[5] (-6,691)	$ 9,174
	Preston	0	0	0	0	14,136
	Bogle	0	0	0	1,600[6] (-1,600)[7]	1,600
2-87	Powell	0	3,746[8]	3,746[9]	0	15,981
	Preston	720[10]	1,356[11]	720[12]	0	23,394
	Bogle	0	0	0	0	544
3-87	Powell	0	6,004[13]	6,004[14]	0	548
	Preston	0	0	0	0	4,989
	Bogle	0	0	0	0	2,304
4-87	Powell	6,004[15]	5,871[16]	5,871[17]	0	19,198
	Preston	0	0	0	0	17,834
	Bogle	0	2,304[18]	4,848[19]	2,304[20] (-2,544)	2,752
1987 TOTALS		$6,724	$21,719	$30,363	$21,083	$132,454

1. Reports are submitted to DOJ on a semi-annual basis for the 6-month period ending March 31 and September 30. Individual figures by quarter and firm were supplied as Exhibit A to PAS' Reply to Answer. Comsat maintains that the these reports are irrelevant, but did not dispute the figures submitted by PAS.

2. The lobbying firms used by INTELSAT in 1987 for lobbying on the issue of separate satellite systems were Preston, Thorgrimson, Ellis & Holman ("Preston"); Powell, Goldstein, Frazer & Murphy ("Powell"); and Bogle & Gates ("Bogle"). Comsat Opposition at 6-8.

3. Powell submitted an FRLA report on 4/15/87 which showed first quarter receipts of $9,174. Powell later told INTELSAT that this figure was incorrect and promised an amended figure. INTELSAT did not report this to Comsat and did not report any lobbying expenses by Powell at this

time. On 9/21/87, Powell filed an amended report for the first quarter reporting $2,438 as the revised figure, along with $3,746 in second quarter receipts. The firm's records "indicate that it attempted to telecopy these reports to INTELSAT; however, INTELSAT's records indicate that they were never received." Thus, says Comsat, it never learned of the existence of these reports despite checking. Comsat Opposition at 7-8, Attachment C.

4. Id.

5. Id.

6. Complaint at Ex. E.

7. The amended report of 1/31/88 was further amended in Comsat's Opposition, in which Comsat stated that Bogle had "reviewed its records again and has determined that its January 31 [1988] filing was incorrect and should be amended further, because it reported the firm's full receipts from INTELSAT as lobbying when . . . most of these receipts were for other work. The firm's only lobbying activity on behalf of INTELSAT occurred during the fourth quarter" and totalled $2,304. Comsat Opposition at 8-9, Attachment D.

8. See Note 1.

9. See Note 1.

10. Complaint at Ex. c

11. Still, the Bureau arguably indicated that Comsat should report staff contacts where relevant, as well as contacts with members of Congress. (Bureau Order, supra, at n. 4). Therefore, Comsat asked Preston (only) for a special report covering theses staff contacts that were intended to influence the passage or defeat of legislation. Comsat states that, based on this special report, that total amount attributable (for Commission purposes) to Preston during calendar year 1987 would be $1,356. Comsat Opposition at 6-7. Comsat explains that this additional step was necessary as to this one lobbying firm, because the Powell and Bogle firms included staff contacts in their FRLA reports and there was thus no need to make a special request for this information. Comsat Answer at 5-6.

12. Id.

13. Complaint at Exs. A and E.

14. Comsat Opposition at 7-8 and Att. C.

15. Complaint at Exhibits A and C.

16. Comsat Opposition at 7-8, Att. C.

17. Id.

18. Comsat Opposition at 8-9, Att. D.

19. Complaint at 10, Ex. F.

20. "The firm's only lobbying activity on behalf of INTELSAT occurred during the fourth quarter, and the total amount expended . . . was $2,304." Comsat Opposition at 8-9, Att. D

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Mateo	CSR-3779
County Community College	CA0245
District against Viacom	
Cable San Francisco	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1993; Released: July 8, 1993

By the Chief, Mass Media Bureau:

1. On January 26, 1993, a petition on behalf of the San Mateo County Community College District, licensee of Station KCSM-TV (Educ., Ch. 60), San Mateo, California, was filed with the Commission claiming that Viacom Cable San Francisco ("Viacom"), had declined to carry the station, even though the Grade B contour of KCSM-TV encompasses the system's principal headend in San Francisco, California, and it is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

3. Since no other pleadings were filed in this matter within the fifteen (15) day period specified by the Commission in its Public Notice, Mimeo No. 32419 (released March 26, 1993), the complaint filed January 26, 1993, by San Mateo County Community College District IS GRANTED, in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Viacom Cable San Francisco IS ORDERED to commence carriage of KCSM-TV forty-six (46) days from the date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

ERRATUM

Released: June 30, 1993

The *Order*, FCC 93-304, released June 15, 1993, in the above-captioned proceeding is corrected as follows:

1) Paragraph 8 is corrected to refer to Section 76.1090(a) instead of Section 76.900(a), and now reads: "IT IS FURTHER ORDERED, that the freeze of cable service rates established in *Order*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, 8 FCC Rcd 2921, *clarified*, 8 FCC Rcd 2917 (1993) IS EXTENDED until November 15, 1993 and that effective 30 days from publication in the Federal Register, *Section 76.1090(a)* of the Commission's rules IS AMENDED as set forth in Appendix A."

2) The third line of Appendix A is corrected to refer to Section 76.1090(a) in lieu of Section 76.900(a), and now reads, "*Section 76.1090(a)* is revised to read as follows:".

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-198

In the Matter of

Preparation for International
Telecommunication Union
World Radiocommunication
Conferences

NOTICE OF INQUIRY

Adopted: June 24, 1993; Released: June 28, 1993

Comment Date: July 19, 1993
Reply Comment Date: July 29, 1993

By the Commission:

INTRODUCTION

1. By this Notice of Inquiry (NOI) we initiate a proceeding to prepare for the 1993 International Telecommunication Union (ITU) World Radiocommunication Conference (WRC-93). WRC-93, the first conference under the new plan for scheduling WRCs biennially, will meet November 15-19, 1993 in Geneva, Switzerland. WRC-93 is expected to select substantive issues for the agendas for the 1995 and 1997 WRCs. In this NOI, we seek information to assist us in identifying issues for inclusion on the WRC-95 and WRC-97 agendas, and in developing U.S. positions on those issues.

BACKGROUND

2. *ITU Restructuring.*[1] In December of 1992, the ITU Additional Plenipotentiary Conference (APP) adopted a major restructuring of the ITU. While retaining the role of the Plenipotentiary Conference as the supreme organ of the ITU, and the essential roles of the Council (formerly the Administrative Council) and the General Secretariat, significant changes were made in the organization of the technical bodies that formerly comprised the specialized secretariats. Three major topical sectors have been established: 1) the Radiocommunication Sector (RS) that deals with radiocommunication matters to ensure rational, equitable and efficient use of the radio-frequency spectrum;[2] 2) the Telecommunication Standardization Sector (TSS) that studies and adopts recommendations relative to technical, operational and tariff questions with a goal of standardizing telecommunications worldwide; and 3) the Telecommunication Development Sector that promotes the development, expansion and operation of telecommunication networks and services, particularly in developing countries. Each sector works through a Bureau and conducts studies and develops decisions through conferences and study groups.

3. *1993 World Radiocommunication Conference.* The APP recommended that WRCs convene every two years, beginning in November 1993.[3] The ITU Council (Council) proposes that WRC-93 recommend issues for the 1995 and 1997 WRCs. In addition, it directs that WRC-93 consider scheduling two specific topics for inclusion on the agenda for WRC-95: 1) a review of the Radio Regulations based upon a report of the Voluntary Group of Experts (VGE),[4] and 2) facilitating use of frequency bands allocated to the mobile-satellite service.[5] The Council recommendations for WRC-93 were subsequently adopted.[6]

DISCUSSION

4. We seek information and comment relating to telecommunications issues to be addressed at future World Radiocommunication Conference meetings.[7] The information we obtain will help us to determine United States' positions on issues at WRC-93, including whether the United States will seek to place specific issues on the WRC-95 and WRC-97 agendas, and, if so, its position on these issues. In addition to the two issues the Council recommends including on the WRC-95 agenda, we have identified several issues of importance to this country for possible inclusion on the agendas of WRC-95 or WRC-97: 1) broadcasting-satellite service (sound); 2) wind profiler radar systems; 3) space services; and 4) high frequency broadcasting. We discuss each of these issues below. Interested parties are asked to address whether and how the United States' interests will be served by placing each of these items on the agendas of WRC-95, WRC-97 or a later WRC (*i.e.*, WRC-99, WRC-2001, etc.).[8] Parties are also invited to suggest new issues for inclusion on future WRC agendas in addition to those presented herein.

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[1] *See Final Acts of the Additional Plenipotentiary Conference*, Geneva, 1992. Specifically, for restructuring of the see Articles 7-14 of the *Constitution* (CS).

[2] The RS includes a nine-member part-time Radio Regulations Board (formerly members of the IFRB) which approve the Rules of Procedure for application of the Radio Regulations to the registration of frequency assignments. The Radio Regulations Board also carries out duties related to the task above.

[3] Some flexibility is permitted. Biennial conferences need not be convened, or additional conferences may be convened, as determined by the Council. *See Final Acts of the Additional Plenipotentiary Conference, supra*, Article 11B (CS).

[4] *See Summary Report of the Fifth Meeting of the VGE*, VGE Document 140-E (February 23, 1993).

[5] *See* Resolution No. 1032, Document 7346-E, 47th ITU Administrative Council (Geneva, 1992); attached as Appendix I.

[6] *See* ITU Notification No. 1303 (Information received by 10 February 1993), Consultations.

[7] We note that although WRC-93 will recommend, and the Council will later adopt, the agendas for WRC-95 and WRC-97, an intervening Council may modify these agendas.

[8] The new biennial scheduling of WRCs should help reduce the pressure to include topics on the agenda of the earliest possible WRC. For example, with respect to WRC-95, we note that the two topics the Council directed that conference to consider, the report of the VGE and facilitating use of MSS bands, are likely to represent a substantial workload.

5. *Consideration of the Report of the Voluntary Group of Experts (VGE).* The Council formed the VGE in 1990 to develop recommendations for simplifying the international Radio Regulations.[9] The tasks of the VGE include: 1) simplifying the international Table of Frequency Allocations (international Table) and international Radio Regulations related to it; 2) simplifying regulatory procedures contained in Articles 11-17 of the international Radio Regulations; and 3) simplifying the remainder of the international Radio Regulations not covered specifically under items 1 and 2. Although the work of the VGE is not complete,[10] it will output a report that makes recommendations concerning its task in the first half of 1994. The VGE will present its report to the Council and distribute it to administrations for consideration at WRC-95. Interested parties are alerted here that VGE matters will be considered at WRC-95 and that they may comment on specific VGE proposals later. At this time, we are interested in any matters related to the VGE tasks generally that may require attention at WRC-95 or WRC-97.

6. *Mobile-Satellite Service.* The bands 1492-1525, 1525-1559, 1610-1660.5, 1675-1710, 1930-2010, 2120-2200, 2483.5-2520 and 2670-2690 MHz are allocated for mobile-satellite services. Mobile-satellite services include aeronautical, maritime, land mobile and radiodetermination satellite services.[11] However, the mix of satellite services, and their status relative to other services in the bands referenced, are not consistent throughout the three regions of the international Table.

7. U.S. entities have shown significant interest in providing mobile satellite services (MSS) from both geostationary (GSO) and low earth orbit (LEO) satellite platforms.[12] These entities envision competing in a global market for MSS.[13] At world conferences, the United States has strived consistently for flexible, worldwide, generic MSS allocations[14] to meet future demand.

8. We continue to believe that spectrum allocations to generic MSS operations yield the greatest spectrum efficiencies and economies of operation.[15] The Council recommended that WRC-93 include on its agenda for WRC-95 guidance on facilitating use of frequency bands allocated to the mobile-satellite service worldwide. WRC-93 therefore presents an opportunity for the United States to advocate resolution of issues affecting use of these bands and satellite feeder links at WRC-95. In certain regions, the 1992 World Administrative Radio Conference (WARC-92) placed restrictions on the type of transmissions MSS operators can engage in, and on the date that MSS operations can commence.[16] Because U.S. industry wants to engage in global MSS operations, parties should address preferred U.S. positions concerning MSS issues at WRC-95. Particular attention should be addressed to the attendant footnotes and resolutions adopted or modified at WARC-92 that would affect use of the MSS frequency bands.[17] Commenters should note that little time has passed since the conclusion of WARC-92, and therefore should provide rationale for including selected items in, or conversely, for limiting the scope of,[18] U.S. positions on MSS issues at WRC-95.

9. *Broadcasting-Satellite Service (Sound).*[19] WARC-92 adopted Broadcasting-Satellite Service (sound) (BSS (sound)) allocations in three bands.[20] Resolution No. 528 (RES528) of WARC-92 notes that efficient use of the BSS (sound) spectrum would be enhanced by a worldwide allocation in the 1-3 GHz range. However, it also noted that a worldwide allocation might cause difficulties in some countries in relation to existing services and that future planning may limit the effect of BSS (sound) on other services.[21] Thus, by RES528, WARC-92 resolved that a competent conference should convene before 1998 to address planning of BSS (sound) in the bands allocated to it in the 1-3 GHz range, to develop procedures for coordination of complimentary terrestrial broadcasting and to review necessary criteria for sharing with other services. Until a planning conference convenes, RES528 directs that BSS (sound) systems may only be introduced in the upper 25 MHz of the appropriate frequency band in order to reserve future planning options.

10. In the United States, international planning for BSS (sound) does not appear to be necessary, since the U.S. allocation is common only to the United States and India. In GEN Docket No. 90-357,[22] the Commission proposed to adopt the international BSS (sound) allocation at 2310-2360 MHz for the United States. Four applicants

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[9] *See* Resolution No. 8, ITU Plenipotentiary Conference (Nice, 1989).

[10] The *Summary Report of the Fifth Meeting of the VGE* is attached as Appendix III.

[11] These services are usually abbreviated as AMSS, MMSS, LMSS and RDSS respectively.

[12] For example, *See Report and Order*, ET Docket No. 91-280, 8 FCC Rcd 1812 (1993); *Notice of Proposed Rule Making*, ET Docket Notice of Proposed Rule Making, ET Docket No. 92-191, 7 FCC Rcd 5626 (1992); and, *Notice of Proposed Rule Making*, GEN Docket No. 90-56, 5 FCC Rcd 1255 (1990).

[13] Specifically, entities that intend to provide services from low earth orbit satellite platforms.

[14] A generic MSS allocation would permit subcategories of MSS, including aeronautical, maritime and land mobile MSS to operate within a MSS spectrum allocation as demand and international coordination dictate.

[15] To facilitate a generic approach it may be necessary to adopt special provisions that delineate priority of communications within a given MSS frequency band (e.g. Article 61 of the RR as it concerns Maritime Mobile and Maritime Mobile-Satellite Services) and/or other provisions dealing with safety communications. These types of provisions may be considered in association with MSS issues at WRC-95.

[16] *See* generally, *Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (Final Acts)*, Malaga-Torremolinos, 1992.

[17] In this regard, parties are referred to the following footnotes adopted or modified at WARC-92: 726A, 726B, 726C, 726D, 739B, 730C, 731E, 731F, 733A, 733E, 734, 735A, 740A, 746A, 746B, 746C, 753, 753C, 753F, 754, 754B, 755A, 760A, 764A and 766; and the following resolutions: No. 46, No. 70 and No. 213.

[18] For example, one approach might be to limit the treatment of MSS matters solely to advancing the implementation date in 746B (WARC-92) to establish a common date for global implementation of MSS in the relevant bands.

[19] BSS (sound) commonly is referred to as satellite DAB or satellite DARS in the United States.

[20] The three bands allocated are 1452-1492 MHz, 2310-2360 MHz and 2535-2655 MHz. The United States and India are allocated the 2310-2360 MHz band. The majority of countries are allocated the 1452-1492 MHz band. Twelve countries are allocated the 2535-2655 MHz band. *See Final Acts, supra.*

[21] *See* Resolution No. 528 (WARC-92), *Final Acts, supra.*

[22] *See Notice of Proposed Rulemaking and Further Notice of Inquiry*, GEN Docket No. 90-357, 7 FCC 7776 (1992).

already have applied for licenses to initiate BSS (sound) operations.[23] We request comment on any outstanding international issues that need to be addressed, such as RES528 restricting BSS (sound) systems to the upper 25 MHz of the BSS (sound) bands until a planning conference is completed, to help introduction of U.S. systems. We also request that parties address BSS (sound) coordination vis-a-vis existing terrestrial operations. It is likely that planning and coordination with some existing terrestrial operations will be necessary, such as Canadian and Mexican terrestrial operations along our borders.

11. *Wind Profiler Radars.* WARC-92 invited the CCIR to make appropriate technical recommendations regarding operation of wind profiler radar systems (wind profiler)[24] at frequencies near 50, 400, and 1000 MHz.[25] In response, Radiocommunication (formerly CCIR) Task Group 8/2 is studying suitable frequency bands for wind profilers.[26] The United States[27] is participating in the work of this group and has addressed the suitability of frequency bands, site selection criteria, technical characteristics and spectrum requirements. The work of Task Group 8/2 is planned to be complete by the close of 1993. WARC-92 also recommends that the COSPAS-SARSAT system be protected by not locating wind profilers in the 402-406 MHz band, and invited the Council to include consideration of appropriate frequency assignments for wind profilers at the next competent WRC.

12. On March 10, 1993, the Commission proposed to allocate the 448-450 MHz band for wind profilers.[28] This band was selected based on a study by the National Telecommunications and Information Administration (NTIA). The NTIA study concluded that the 440-450 MHz band offers the best potential location for wind profiler operations.[29] In the *Notice* in that proceeding, the Commission tentatively concluded that the 448-450 MHz band poses the least threat of interference to the primary Government users[30] and the secondary amateur licensees operating in the 420-450 MHz band. The Commission also requested comment on the need for additional spectrum for wind profiler applications on other frequencies,[31] including use of the 914-916 MHz band.[32]

13. Considering the work of Task Group 8/2, the Commission's proposal to allocate spectrum for wind profilers and REC621 that invites the Council to consider including on the next competent WRC (in our view 1995, or more likely later) appropriate frequency allocations for operational use of wind profilers, we invite parties to comment on whether to address international wind profiler allocation issues at WRC-95 or WRC-97.

14. *Space Services.* WARC-92 adopted RES712 that resolved that the next competent WRC considers certain matters concerning the space services. These matters are: 1) worldwide primary allocations for the earth-exploration and space research services in the appropriate bands within the 8-20 GHz range; 2) inter-satellite service requirements near 23 GHz; 3) providing spectrum for space-based active earth sensors around the 35 GHz band; and 4) including certain CCIR-developed space science service coordination parameters in Appendix 28 of the Radio Regulations. Considering RES712, we request comment on these matters.

15. *High Frequency Broadcasting Planning.* Worldwide high frequency (HF) broadcasting both domestic and international is conducted in bands allocated to the broadcast service between 5950 kHz and 26.1 MHz. HF broadcasters share and use these frequencies on an extensive, continuous basis. Consequently, frequency coordination among administrations is necessary to avoid harmful interference.

16. The current procedure for coordinating international HF broadcast frequency use is specified in Article 17 of the international Radio Regulations[33] Article 17 provides for voluntary consultations among administrations regarding HF broadcasting use. A World Administrative Radio Conference for the Planning of HF Bands Allocated to the Broadcasting Service (HFBC-87) convened in 1987 to develop a computer-based planning system that would replace the Article 17 coordination procedures for selected bands. However, HFBC-87 deferred a planning decision for at least five years due to difficulties encountered in developing a computer-based system.[34] Subsequently, the Nice Plenipotentiary Conference scheduled a WARC for 1993 to address HF broadcasting planning issues. However, due to an IFRB report

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[23] *See* applications of American Mobile Radio Corp., File Nos. 26/27-DSS-LA-93, 10/11-DSS-P-93; Digital Satellite Broadcasting Corp., File Nos. 28-DSS-LA-93, 12/13-DSS-P-93; Primosphere Limited Partnership, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93; and Satellite CD Radio, Inc., File Nos. 49/50-DSS-P/LA-90, 58/59-DSS-AMEND-90, 8-DSS-MISC-91(2).

[24] Wind profiler radar systems use radar signals to measure wind speed and direction, vertical wind velocity, intensity of turbulence and precipitation parameters. These systems are also used to track movement of particulate masses in the air. They have vertical resolution of 100 to 1000 meters from heights of 200 meters to over 18 kilometers. Data from wind profilers can be used to provide timely and accurate measurements of wind conditions (such as wind shear) for aviation; to improve weather forecasting and advance storm warning for meteorology; and to analyze air mass movement for environmental studies.

[25] Recommendation No. 621 (REC621), Implementation of Wind Profiler Radars at Frequencies near 50 MHz, 400 MHz and 1000 MHz, *Final Acts WARC-92, supra.*

[26] *See CCIR Administrative Circular/375* (1992).

[27] U.S. participants include representatives from the FCC, NTIA, and other interested government agencies, and private industry.

[28] *Notice of Proposed Rule Making and Notice of Inquiry (Notice/NOI)*, ET Docket No. 93-59, 58 FR 19644 (1993).

[29] *See Assessment of Bands for Wind Profiler Accommodation*, NTIA Report 91-290 (1991).

[30] The primary Government uses in this spectrum are radiolocation and space telecommand.

[31] Wind profilers operating higher in frequency provide finer resolution at lower altitudes than those operating at lower frequencies.

[32] The 914-916 MHz band for wind profilers was proposed in a petition filed by Radian Corporation, RM-8092 (1992). *See Notice/NOI, supra.*

[33] Article 17, International Telecommunication Union *Radio Regulations* (1990). Article 17 provides coordination procedures relative to bands allocated exclusively to broadcasting. However, it is noted that much use of other HF bands is conducted on a non-interference basis pursuant to RR 342.

[34] HFBC-87 did instruct the International Frequency Registration Board (IFRB) to continue revising the proposed computer planning system.

that emphasizes difficulties in implementing a computer-based planning system, the Council, at its 46th Session (1991), decided not to convene a 1993 WARC for HF broadcasting planning.

17. WARC-92 allocated additional spectrum to the HF broadcast service.[35] However, use of the additional spectrum is subject to planning procedures to be developed by a future conference.[36] Additionally, the APP and the Council have requested that the Radiocommunication Assembly (RA) (formerly the CCIR Plenary Assembly) associated with the 1993 WRC establish a work program regarding future work on HF broadcasting taking account of any IFRB report on the application of RES523 (WARC-92).[37]

18. Interested parties should comment on how the RA should address HF broadcasting planning issues within current allocations and the expected relationship of RA recommendations to the development of agendas for future WRCs. Parties should note that historically the needs of U.S. HF broadcasters have been met satisfactorily through the existing Article 17 coordination procedures, and therefore, should comment on the urgency of addressing the HF issues described at a forthcoming WRC.

19. *Other Matters.* There are many Resolutions and Recommendations (RES/RECS) from past conferences (beginning approximately with WARC-79) that remain unresolved. Appendix II of this document provides a list and brief description of those RES/RECS. Since WRCs will be held biennially, we can begin planning for the placement and disposal of these RES/RECs by future conferences.[38] We invite comment from knowledgeable parties on the appropriate timeframe for considering these items at upcoming WRCs.[39]

PROCEDURAL MATTERS

20. Authority for this *Notice of Inquiry* is contained in Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), and 403. Pursuant to Section 1.1204(a)(4) of the Commission's Rules, 47 CFR Section 1.1204(a)(4), no *ex parte* restrictions apply to this proceeding.

21. U.S. government conference preparations have begun and are being conducted by the Interdepartment Radio Advisory Committee (IRAC) and its Ad Hoc 208 interagency group. Ad Hoc 208 will be responsible for coordinating the preparatory activities of affected government agencies that use frequencies allocated for the government's telecommunications needs. The IRAC will make its conference recommendations to NTIA, which is responsible for developing Executive Branch telecommunications policies. NTIA's recommendations for U.S. policy and proposals will then be forwarded to the Department of State for coordination with the Commission's recommendations. Because the Commission participates in IRAC through a liason representative, we expect the Commission's and NTIA's recommendations for U.S. proposals to be generally consistent.

22. The Commission's recommendations will be forwarded to the Department of State for coordination with NTIA's recommendations as discussed above. WRC-93 is scheduled for November 11-15, 1993. Therefore, the Department of State would normally submit U.S. proposals by September 10, 1993. In view of the short period available for preparation and submission of U.S. proposals, the Commission is requesting comments within 21 days of the release of this Notice of Inquiry at the Commission's headquarters, and reply comments within 10 days thereafter. The dates are given below.

23. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Section 1.415 and 1.419, interested parties may file comments on or before **July 19, 1993**, and reply comments on or before **July 29, 1993**. All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Public Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street NW, Washington, DC 20554.

24. For further information concerning this *Notice of Inquiry*, contact Damon C. Ladson, Office of Engineering and Technology, or Thomas M. Walsh, Office of International Communications, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[35] The additional bands allocated to HF broadcasting at WARC-92 are: 5900-5950, 7300-7350, 9400-9500, 11600-11650, 12050-12100, 13570-13600, 13800-13870, 15600-15800, 17480-17550 and 18900-19020 kHz.

[36] *See* RR Footnote 521B (WARC-92) and Resolution No. 523B (WARC-92).

[37] *See* Resolution No. 523 (WARC-92).

[38] For example, consideration of REC318 may lead to rechannelling of the VHF maritime band to 12.5 kHz and revision of Appendix 18 of the Radio Regulations. The Commission has this matter under consideration as part of our review of future trends concerning maritime communications. *See Notice of Proposed Rulemaking*, PR Docket No. 92-257, 7 FCC Rcd 7863 (1992).

[39] Unresolved resolutions and recommendations from past conferences are listed, with a brief description in Appendix II.

APPENDIX I

INTERNATIONAL TELECOMMUNICATION UNION
ADMINISTRATIVE COUNCIL
47th SESSION - GENEVA - DECEMBER 1992

Document 7346-E
(CA47-130)
20 December 1992
Original: English

RESOLUTION

(approved at the final meeting (20.12.92))

R. No. 1032 World Radiocommunication Conference, 1993

The Administrative Council,

having considered

1. APP Recommendation No. PLEN/4,
2. APP Recommendation No. PLEN/1,

resolves

to convene a World Radiocommunication Conference in Geneva, for a period of five days starting on 15 November 1993, with the following agenda:

1. to make recommendations to the Council concerning the agenda for the 1995 World Radiocommunication Conference, including the review of the international Radio Regulations based on the report of the Voluntary Group of Experts and any guidance on facilitating the use of frequency bands allocated to the mobile-satellite service, by recommending the inclusion of these matters in the agenda of the 1995 World Radiocommunication Conference; and

2. to make recommendations for the preliminary agenda for the 1997 World Radiocommunication Conference.

APPENDIX II

Resolutions and Recommendations Related to Future ITU World Radiocommunication Conferences

Resolutions

Res. 4 (ORB-88) Period of Validity of Frequency Assignments to Space Stations Using the Geostationary-Satellite Orbit

Res. 8 (HFBC-87) Implementation of the Changes in Allocations in the Bands Between 4000 and 27500 kHz

Res. 16 (WARC-79) Relating to the Role of Telecommunications in Integrated Rural Development

Res. 19 (MOB-87) The Need to Study the Question of Including Decisions of Regional Administrative Radio Conferences in the international Radio Regulations

Res. 35 (WARC-79) Relating to a Procedure for Resolving a Disagreement over the Technical Standards or Rules of Procedure of the International Frequency Registration Board

Res. 39 (MOB-83) Relating to the Improved Use of the International Monitoring System In Applying Decisions of Administrative Radio Conferences

Res. 42 (ORB-88) Use of Interim Systems in the Broadcasting-Satellite and Fixed-Satellite (Feeder Link) Services in Region 2 for the Bands Covered by Appendix 30 (ORB-85) and Appendix 30A (ORB-88)

Res. 46 (ALOC-92) Interim Procedures for the Coordination and Notification of Frequency Assignments of Non-Geostationary-Satellite Networks in Certain Space Services and the other services to which the bands are allocated: resolves that a future WARC address the need for permanent procedures

Res. 60 (WARC-79) Information on the Propagation of Radio Waves in the Determination of the Coordination Area

Res. 63 (WARC-79) Protection of Radiocommunication Services Against Interference Caused by Radiation from Industrial, Scientific and Medical (ISM) Equipment

Res. 70 (ALOC-92) Establishment of standards for the operation of low-orbit satellite systems

Res. 94 (ALOC-92) Review of Resolutions and Recommendations of the World Administrative Radio Conferences

Res. 110 (ORB-88) Improved Procedures for Certain Bands of the Fixed-Satellite Service

Res. 111 (ORB-88) Planning of the Fixed-Satellite Service in the Bands 18.1-18.3 GHz, 18.3-20.2 GHz and 27-30 GHz

Res. 112 (ALOC-92) Allocation of Frequencies to the Fixed-Satellite Service in the Band 13.75-14 GHz: resolves that the next WARC review the coordination and technical sharing parameters for the Fixed-Satellite and Space Research Services at 13.75-14 GHz

Res. 113 (ALOC-92) Adjustments to the fixed service as a consequence of changes in the frequency allocations within the range 1-3 GHz

Res. 200 (MOB-87) Class of Emission to be Used for Distress and Safety Purposes on the Carrier Frequency 2182 kHz: complete transfer to new emission on 2182 KHz be decided by WRC

Res. 208 (MOB-87) Extension of the Frequency Bands Allocated to the Mobile-Satellite and Mobile Services and Their Conditions of Use

Res. 209 (MOB-87) Study and Implementation of a Global Land and Maritime Distress and Safety System

Res. 210 (MOB-87) Date of Entry into Force of the 10 kHz Guard-band for the Frequency 500 kHz in the Mobile Service (Distress and Calling)

Res. 211 (ALOC-92) Use by the Mobile Service of the Frequency Bands 2025-2110 and 2200-2290 MHz: resolves that the next competent WARC examine the sharing of 2025-2110 MHz and 2200-2290

Res. 212 (ALOC-92) Implementation of Future Public Land Mobile Telecommunication Systems: invites CCIR/CCITT to develop technical characteristics and numbering plan to facilitate worldwide roaming for PLMTS

Res. 213 (ALOC-92) Sharing Studies Concerning the Use of the Bands 1492-1525 MHz And 1675-1710 MHz in Region 2 by the Mobile-Satellite Service: invites CCIR to study sharing at 1.5 and 1.7 GHz in Region 2 of allocated services and mobile satellite service

Res. 300 (MOB-87) Use and Notification of the Paired Frequencies Reserved for Narrow-Band Direct-Printing Telegraph and Data Transmission Systems in the HF Bands Allocated on an Exclusive Basis to the Maritime Mobile Service

Res. 310 (MOB-87) Frequency Provisions for Development and Future Implementation of Ship Movement Telemetry, Telecommand and Data Exchange Systems

Res. 314 (MOB-87) Establishment of a Coordinated World-Wide System for the Collection of Data Relating to Oceanography

Res. 319 (MOB-87) General Review of the Bands 4000-4063 kHz and 8100-8195 kHz Allocated on a Shared Basis to the Maritime Mobile Service

Res. 330 (MOB-87) Frequencies for Routine (Non-Distress) Calling in the Bands Between 1605 kHz and 4000 kHz

Res. 331 (MOB-87) Introduction of Provisions for the Global Maritime Distress and Safety System (GMDSS) and Continuation of the Existing Distress and Safety Provisions

Res. 332 (MOB-87) Use of the Frequency 4209.5 kHz for NAVTEX type Transmissions in the Maritime Mobile Service

Res. 333 (MOB-87) Coordination of the Use of HF Maritime Mobile Frequencies for Transmission of High Seas Maritime Safety Information

Res. 334 (MOB-87) Inclusion in the Regulations to be Adopted by the World Administrative Telegraph and Telephone Conference (WATTC-88) of Provisions Concerning Charging and Accounting for Maritime Radiocommunications in the Maritime Mobile-Satellite Service except for Distress and Safety Communications, and Consequential Modifications to Article 66 of the international Radio Regulations

Res. 408 (MOB-87) Use of the Band 136-137 MHz by Services Other than the Aeronautical Mobile (R) Service

Res. 505 (WARC-79) Broadcasting-Satellite Service (Sound) in the Frequency Range 0.5 GHz to 2 GHz

Res. 507 (WARC-79) Relating to the Establishment of Agreements and Associated Plans for the Broadcasting-Satellite Service

Res. 508 (WARC-79) Relating to the Convening of a World Administrative Radio Conference for the Planning of the HF Bands Allocated to the Broadcasting Service

Res. 511 Programme of Action Relating to the Improvement, Testing, Adoption and Practical Implementation of the Planning System for the High Frequency Bands Allocated Exclusively to the Broadcasting Service, and Associated Provisions

Res. 512 (HFBC-87) Operation of HFBC Transmitters in the Extended Bands Above 10 MHz

Res. 513 (HFBC-87) Improvement in the Use of the HF Bands Allocated Exclusively to the Broadcasting Service by Avoiding Harmful Interference

Res. 515 (HFBC-87) Improvements to the HFBC Planning System and the Consultation Procedures

Res. 517 (HFBC-87) Transition from Double-Sideband (DSB) to Single-Sideband (SSB) Emissions in the HF Bands Allocated Exclusively to the Broadcasting Service

Res. 519 (ORB-88) Possible Extension to Regions 1 and 3 of Provisions for Interim Systems: resolves that a future WARC consider the possible application of regulatory provisions for BSS interim systems in Regions 1 & 3

Res. 522 (ALOC-92) Further Work By The CCIR Concerning the Broadcasting-Satellite Service (Sound): resolves that the CCIR study the broadcasting-satellite service (sound) with a view to developing provisions for sharing with other services in the same frequency band and that a competent WARC address this issue

Res. 523 (ALOC-92) Resolves that a WARC be convened to plan the bands allocated to HFBC at WARC '92; also WARC 1992 expanded bands not to be used until planning process has been completed.

Res. 524 (ALOC-92) Future Consideration of the Plans for the Broadcasting-Satellite Service in the Band 11.7-12.5 GHz (Region 1) and the Band 11.7-12.2 GHz (Region 3) in Appendix 30 and the Associated Feeder-

Link Plans in Appendix 30A: resolves that a radio conference be convened to review and improve the Region 1 and 3 BSS plans at 11.7-12.5 GHz (Region 1) and 11.7-12.2 GHz (Region 3)

Res. 526 (ALOC-92) Future Adoption of Procedures to Ensure Flexibility in the Use of the Frequency Band Allocated to the Broadcasting-Satellite Service (BSS) for Wide RF-Band High-Definition Television (HDTV) and to Associated Feeder Links: resolves that a future WARC address the procedures for Broadcasting-Satellite for wide RF-band HDTV and associated feeder links

Res. 527 (ALOC-92) Terrestrial VHF Digital Sound Broadcasting: resolves that a competent administrative radio conference address VHF terrestrial DAB for Region 1 and interested Region 3 countries

Res. 528 (ALOC-92) Introduction of the Broadcasting-Satellite Service (Sound) Systems and Complementary Terrestrial Broadcasting in the Bands Allocated to those services Within the Range 1-3 GHz: resolves that a competent WARC be convened not later than 1998 to plan BSS (sound)(S) in 1-3 GHz range, and to develop procedures for complementary terrestrial broadcasting

Res. 602 (MOB-87) Data Transmission for Maritime Radiobeacons for Differential Radionavigation Systems (Region 1)

Res. 641 (HFBC-87) Use of the Frequency Band 7000-7100 kHz

Res. 702 (WARC-79) Convening of a Regional Administrative Radio Conference to Establish Criteria for the Shared Use of the VHF and UHF Bands Allocated to Fixed, Broadcasting and Mobile Services in Region 3

Res. 704 (MOB-87) Holding of a Regional Administrative Radio Conference to Prepare Frequency Assignment Plans for the Maritime Mobile Service in the Bands Between 435 kHz and 526.5 kHz and in Parts of the Band Between 1606.5 kHz and 3400 kHz in Region 1 and to Plan for the Aeronautical Radionavigation service in the Band 415-435 kHz in Region 1

Res. 705 (MOB-87) Mutual Protection of Radio Services Operating in the Band 70-130 kHz

Res. 706 (MOB-87) Operation of the Fixed and Maritime Mobile Services in the Band 90-110 kHz

Res. 710 (ALOC-92) Primary Service Requirements for the Meteorological-Satellite and Earth Exploration-Satellite Services In the Band 401-403 MHz: resolves that the next competent WARC examine the meteorological-satellite and Earth exploration-satellite allocations in the bands 401-402 MHz and 402-403 MHz with the intent of raising the allocation status to primary

Res. 711 (ALOC-92) Possible Relocation of Frequency Assignments to Certain Space Missions from the 2 GHz Band to Bands above 20 GHz: resolves that the next competent WARC consider reallocation of frequencies supporting space missions in the 2 GHz band to bands above 20 GHz

Res. 712 (ALOC-92) Consideration by a Future competent WARC of issues dealing with Allocations to Space Services Which Were not Placed on the Agenda of WARC-92

RECOMMENDATIONS

Rec. 2 (WARC-79) Relating to the Examination by World Administrative Radio Conferences of the Situation with Regard to Occupation of the Frequency Spectrum in Space Radiocommunications

Rec. 13 (WARC-79) Relating to a World Administrative Radio Conference to Carry Out a General or Partial Revision of the international Radio Regulations

Rec. 14 (MOB-87) Identification and Location of Special Vessels, such as Medical Transports, by Means of Standard Maritime Radar Transponders

Rec. 15 (ORB-88) Review of Article 14 of the international Radio Regulations and Further Development of Technical Criteria for its Application

Rec. 66 (ALOC-92) Studies of the Maximum Permitted Levels of Spurious Emissions: recommends that CCIR submit a report to the next competent conference with a view to including spurious emission limits in the international Radio Regulations

Rec. 100 (WARC-79) Preferred Frequency Bands for Systems Using Tropospheric Scatter

Rec. 305 (WARC-79) Use of Channels 15 and 17 of Appendix 18 by On-Board Communication Stations

Rec. 310 (WARC-79) Automated UHF Maritime Mobile Radiocommunication System

Rec. 318 (MOB-87) Improved Efficiency in the Use of the Appendix 18 VHF Frequency Spectrum for Maritime Mobile Communications

Rec. 319 (MOB-87) The Need for Technical Improvements to Minimize the Risk of Adjacent Channel Harmful Interference Between Assignments Used for Narrow-Band Direct-Printing Telegraphy and Data Transmission Systems in Accordance with Appendix 31 and Resolution 300

Rec. 406 (WARC-79) Revision of the Frequency Allotment Plan for the Aeronautical Mobile (OR) Service

Rec. 509 (HFBC-87) Participation by Administrations in the Improvement of the Planning System for the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 510 (HFBC-87) Planning Parameters for the Double-Sideband (DSB) System in the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 512 (HFBC-87) Propagation Prediction Method to be Used in the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 513 (HFBC-87) Broadcasting for National Coverage in the HF Bands

Rec. 514 (HFBC-87) Improvements to the Propagation Prediction Method to be Used for the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 515 (HFBC-87) Introduction of Transmitters and Receivers Capable of Both Double Sideband (DSB) and Single Sideband (SSB) Mode of Operation Rec. 516 (HFBC-87) Use of Synchronized Transmitters in the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 517 (HFBC-87) Relative RF Protection Ratio Values for Single-Sideband (SSB) Emissions in the HF Bands Allocated Exclusively to the Broadcasting Service

Rec. 518 (HFBC-87) HF Broadcast Receivers

Rec. 519 (ALOC-92) Introduction of Single-Sideband (SSB) Emissions and Possible Advancement of the Date for Cessation of he Use of Double-Sideband (DSB) Emissions in the HF Bands Allocated to the Broadcasting Service: invites Administrative Council to include on the agenda of the next competent WARC the date for implementation of single-sideband emissions and cessation of double-sideband emissions in the HFBC bands

Rec. 605 (MOB-87) Relating to Technical Characteristics and Frequencies for Shipborne Transponders

Rec. 606 (MOB-87) The Possibility of Reducing the Band 4200-4400 MHz Used by Radio Altimeters in the Aeronautical Radionavigation Service

Rec. 607 (MOB-87) Future Requirements of the Band 5000-5250 MHz for the Aeronautical Radionavigation Service

Rec. 621 (ALOC-92) Implementation of Wind Profiler Radars at Frequencies near 50 MHz, 400 MHz, and 1000 MHz: invites Administrative Council to include on the agenda of the next competent WARC the question of appropriate frequency allocations for the operational use of wind profiler radars

Rec. 701 (WARC-79) Relating to the Use of the Frequency Band 1330-1400 MHz by the Radio Astronomy Service

Rec. 702 (WARC-79) Relating to the Use of the Frequency Band 1400-1727 MHz, 101-120 GHz and 197-220 GHz for Search For Intentional Emissions of Extraterrestrial Origin

Rec. 707 (WARC-79) Use of the Frequency Band 32-33 GHz Shared Between the Inter-Satellite Service and the Radionavigation Service

Rec. 709 (WARC-79) Sharing Frequency Bands Between the Aeronautical Mobile Service and the Inter-Satellite Service at bands above 50 GHz

Rec. 710 (WARC-79) Use of Airborne Radars in the Frequency Bands Shared Between the Inter-Satellite Service and the Radiolocation Service

Rec. 711 (WARC-79) Relating to the Coordination of Earth Stations

Rec. 714 (MOB-87) Compatibility Between the Aeronautical Mobile (R) Service in the Band 117.975-137 MHz and Sound Broadcasting Stations in the Band 87.5-108 MHz

Rec. 715 (ORB-88) Multi-Band and/or Multi-Service Satellite Networks Using the Geostationary-Satellite Orbit

Rec. 717 (ALOC-92) Sharing Criteria In Frequency Bands Shared By The Mobile-Satellite Service And The Fixed, Mobile And Other Radio Services

Rec. 718 (ALOC-92) Alignment of Allocations in the 7 MHz Band Allocated to the Amateur Service: recommends Administrative Council include on the agenda of the next competent WARC the possibility of aligning amateur allocations around 7 MHz

Rec. 719 (ALOC-92) Multiservice Satellite Networks Using the Geostationary Satellite Orbit: recommends Administrative Council include on the agenda of the next competent WRC the issue of multiservice satellite allocations and definitions

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-433

In re Applications of

ATLANTIC CITY COMMUNITY BROADCASTING, INC.	File No. BPH-870826ME
RADIO-VISION COMMUNICATIONS II, LIMITED PARTNERSHIP	File No. BPH-870826MF
HILLSIDE BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870827MK
ATLANTIC WIRELESS BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870827MO
D&L BROADCASTING	File No. BPH-870827NC

For Construction Permit
for New FM Station, Channel 297B1,
Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1993; Released: July 9, 1993

By the Commission:

1. This proceeding now involves five competing applications for a new FM station on Channel 297B1, Atlantic City, New Jersey. In an Initial Decision, released June 5, 1990, ALJ Edward J. Kuhlmann disqualified Atlantic City Community Broadcasting, Inc. (ACC) on a lack of candor issue concerning a discrimination suit, and preferred Hillside Broadcasting Limited Partnership (Hillside) over Radio-Vision Communications II, Limited Partnership (Radio-Vision), Atlantic Wireless Broadcasting Limited Partnership (Atlantic Wireless), and D&L Broadcasting (D&L) on the comparative issue.[1] *Atlantic City Community Broadcasting, Inc.*, 5 FCC Rcd 3388 (ALJ 1990).

2. The Review Board upheld the ALJ's disqualification of ACC, but selected Radio-Vision, rather than Hillside, as the superior applicant under the standard comparative issue. *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925 (Rev. Bd. 1991). In doing so, the Board fully credited the integration proposal of Radio-Vision's sole general partner, completely discredited the integration proposal of Hillside's sole general partner, and concluded that D&L and Atlantic Wireless deserved at most 51% and 30% credit for their respective integration proposals. Finally, it noted that a remand would be necessary to explore "substantial and material questions of fact as to the suitability and availability of [their] proposed transmitter site[s]" if either D&L or Atlantic Wireless were the prevailing applicant. 6 FCC Rcd at 936 & nn.6, 7.

3. Having reviewed the pleadings before us,[2] we agree with the Board's disqualification of ACC on the candor issue and its award of no integration credit to Hillside. We find, however, that Radio-Vision is entitled to only 20% integration credit, and that D&L is a bona fide applicant deserving 51% integration credit. We find further that the ALJ properly granted D&L's motion for summary decision on the site availability issue, and that it is the comparatively superior applicant. Certain aspects of the Review Board's Decision warrant comment.

4. *ACC's Basic Qualifications:* Notwithstanding ACC's claim concerning the discrimination suit, the Board properly deferred to the ALJ's credibility findings, which were consistent with the record. However, to the extent that the Board suggests (*Id.* at 927 ¶ 12) that ACC's voting stockholder, Lawrence A. Hayes, may have had a motive to conceal the discrimination suit because "he badly want[ed] to be the successful applicant," we agree with ACC that this is not a relevant consideration under the candor issue. Given the time and expense entailed in prosecuting a broadcast application, we would expect that all applicants for a construction permit would have a strong interest in being the successful applicant. Thus, the presence of such a motivation here is of no particular evidentiary significance.

5. *Radio-Vision's Integration Proposal:* Radio-Vision, a limited partnership with four limited partners (80% combined equity interests), seeks 100% quantitative credit for the proposed integration of its sole general partner, Joseph M. Jacobs (20% equity interest). Under *Anax Broadcasting*, 87 FCC 2d 483, 488 ¶ 15 (1981), the equity interests of limited partners that are passive investors having no authority to control the licensee are disregarded for integration purposes. Here, the limited partners have not engaged in any activities belying their formal designation as passive owners.[3] However, Article 4.05(8) of the

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[1] The ALJ's denial of Knight Radio, Inc.'s application on comparative grounds is final as Knight did not file exceptions to the initial decision. Fourteen other applicants for channel 297B1 dismissed their applications before the initial decision.

[2] Now before the Commission are: (a) an Application for Review, filed March 18, 1991, by D & L Broadcasting; (b) an Application for Review, filed March 18, 1991, by Hillside Broadcasting Limited Partnership; (c) an Application for Review, filed March 19, 1991, by Atlantic Wireless Broadcasting Limited Partnership; (d) an Application for Review, filed March 20, 1991, by Atlantic City Community Broadcasting, Inc.; (e) an Opposition to Applications for Review, filed March 27, 1991, by D & L Broadcasting; (f) a Consolidated Opposition to Applications for Review, filed April 2, 1991, by Hillside Broadcasting Limited Partnership; and (g) a Consolidated Opposition to Applications for Review, filed April 5, 1991, and an Erratum thereto, filed April 9, 1991, by Radio-Vision Communications II, Limited Partnership.

[3] As a result of a merger between former applicants Boardwalk Communications, Inc. (BCI) and Radio-Vision I, BCI is now a

partnership agreement permits the general partner to "borrow[...] funds for the construction and operation of the Station ... only with the concurrence of the owners of a majority of the Partnership's equity Ownership Interests."[4] As set forth below, we find that this provision gives the limited partners authority over the partnership that is inconsistent with their designation as purely passive investors, and that attribution of their 80% equity interests is therefore required.

6. Finding that the agreement enabled BCI, a limited partner with a 52% equity interest in Radio-Vision, to control the raising of money by the partnership, the ALJ awarded Radio-Vision only 20% integration credit. 5 FCC Rcd at 3397 ¶ 69. Citing Radio-Vision's more than ample financial cushion to construct and operate for three months without seeking additional loans, the Board deemed this provision to be only a reasonable measure preserving the limited partners' limited liability that did not require the attribution of their equity interests for integration purposes. 6 FCC Rcd at 935 ¶ 40. It therefore awarded Radio-Vision 100% credit for its integration proposal. *Id.* As we agree with the ALJ that the 80% equity interests held by the limited partners are attributable, we reinstate his award of only 20% quantitative integration credit.[5]

7. Whether the provision at issue requires attribution of the limited partners' equity interests is a close question. The Board is correct (6 FCC Rcd at 935 ¶ 40) that Radio-Vision's more than ample financial cushion to construct and operate for three months makes it unlikely that the general partner will need to secure additional loans during that initial period.[6] Nor do we disagree that limited partners may impose reasonable financial and business restrictions designed to preserve their limited liability and still avoid attribution of their equity interests for integration purposes. However, the right to participate in major financial decisions -- such as the determination to borrow additional funds -- is one of the recognized indicia of a legitimate ownership interest.[7]

8. In any event, we cannot conclude that the provision in this case is "no[thing] more than ... a reasonable effort to limit the [limited partners'] liability" not requiring attribution of their equity interests. 6 FCC Rcd at 935 ¶ 40. The requirement that the general partner secure the limited partners' approval for all "borrowing of funds for the construction and operation of the Station" does not expire upon construction and initial operation of the station, or prescribe a debt or interest ceiling below which the general partner may borrow freely. Nor is it narrowly tailored to protect the limited partners only against actions that are outside the ordinary course of business. Thus, despite Radio-Vision's claim that this provision merely protects the limited partners against commercially unreasonable financial terms, the general partner needs the limited partners' concurrence for any loan for station construction and operation secured at any time, whatever its purpose, face value, or repayment terms.

9. That the agreement restricts the exercise of Jacobs' ordinary business judgment in this manner distinguishes this case from *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437 (Rev. Bd. 1989), review denied, 5 FCC Rcd 3712 (1990), which Radio-Vision cites. There, a series of business and financial restrictions prohibiting the general partner from unilaterally selling a substantial and material portion of partnership property, creating a subsidiary to control partnership assets, undertaking a major modification of the station, borrowing from the partnership, lending partnership funds to third parties, or incurring debt above a certain amount and over a specified interest rate were held to be reasonable. 4 FCC Rcd at 6439 ¶ ¶ 11-13. As these restrictions clearly contemplated unusual and unexpected transactions outside the course of ordinary business, they did not permit the limited partners to exercise control over the day-to-day operation of the station or conflict with the insulation standards required to avoid attribution of the limited partners' equity interests. *Id.* In contrast, the open-ended nature of the restriction in this case accords the 52% limited partner unlimited control over whether the partnership can raise additional money to operate the station and how it may do so.

10. We agree with the ALJ (5 FCC Rcd at 3397 ¶ 69) that such control over fundraising decisions -- rather than the availability of adequate funds or the discretion to spend such funds[8] -- is probative of whether the agreement sufficiently insulates Jacobs from influence by the limited partners to avoid attribution of their equity inter-

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52% limited partner of Radio-Vision II. There is no evidence of involvement by BCI or its owners in Radio-Vision's affairs after the merger between BCI and Radio-Vision. Thus, the alleged involvement of BCI's non-voting stockholders in BCI's affairs *before* the merger is not, as the ALJ properly held (5 FCC Rcd at 3396 6 64), a basis for discrediting Radio-Vision's integration proposal. The other 28% is divided among three limited partners: Maurice Stone (10% equity interest), George Polis (10% equity interest), and 1013 New Road Partnership (8% equity interest).

[4] Article 4.05 also provides that the general partner may settle this adjudicatory proceeding, and ask for capital contributions over $100,000 for the prosecution of the application and $400,000 to fund the construction and the operation of the station *"only with the concurrence of the owners of a majority of the Partnership's equity Ownership Interests."*

[5] Under *Royce*, 5 FCC Rcd at 7064 6 9, we attribute all passive interests once any of the passive owners have breached the insulation necessary to avoid attribution.

[6] The partnership agreement obligated the partners to make capital contributions up to $100,000 for the prosecution of the application and up to $400,000 for the construction and the initial operation of the station. But, pursuant to Article 8.05 of the agreement, the general partner warranted that he had obtained or would obtain (on behalf of the partnership) a loan commitment "sufficient to construct and operate the station for three (3) months without reliance on revenues;" each partner agreed to pledge its ownership interest as security for such loan commitment; and the general partner represented that he had sufficient personal assets or a loan commitment to cover prosecution costs "without regard to [the limited partners'] capital contributions."

[7] See, e.g., *KIST Corp.*, 102 FCC 2d 288, 291 6 6 & n.7 (1985). In *KIST*, we reversed the Board's determination that a 35% partner did not have a legitimate ownership interest and therefore could not receive any comparative credit for his proposed integration. In concluding that he was a bona fide owner, we cited the fact that the partnership agreement required his consent "*to borrow or lend money*, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond or lease, ..." (emphasis added).

[8] The partnership agreement gives the general partner exclusive power to direct and control the partnership (Art. 4.01), and prohibits the limited partners from becoming involved in any material respect in the management or operation of the station (Art. 4.04).

ests. To the extent that the Board relied on Radio-Vision's more than ample financial cushion for construction and three months' initial operation in not attributing these interests, we are not persuaded that the applicant's current financial position ensures that Jacobs will not, in the ordinary course of business, decide to borrow additional funds in the future.[9] Any further loan would require the concurrence of the majority limited partner, BCI. This unqualified right to veto any decision to borrow "funds for the construction and operation of the Station" undermines BCI's formal designation as a purportedly passive investor. And the agreement does not preclude the other "limited" partners from participating in fundraising decisions. Thus, Jacobs lacks the exclusive control over the applicant under the partnership agreement necessary to avoid attribution of the limited partners' 80% equity interests under *Anax*.[10] As a result, Radio-Vision is entitled to only 20% quantitative credit for Jacobs' proposed integration.

11. *Hillside's Integration Proposal:* We agree with the Board that Hillside's integration proposal merits no comparative credit. Hillside purports to be a limited partnership. Its general partner, Della B. Baeza (50% equity interest), will be the full-time general manager; her husband, Mario L. Baeza (50% equity interest), the limited partner, will not be integrated or otherwise involved in partnership affairs. While the record reflects that Mario Baeza is a passive investor not in a position to exercise significant control over the applicant,[11] the post-formation record does not persuasively establish that Della Baeza, as the only named general partner, has exercised and will continue to exercise exclusive managerial control. Rather, the pre- and post-formation records reflect that Della Baeza has deferred to her attorney, Morton Berfield, in all matters affecting the application to such an extent that we cannot reliably credit her integration pledge.[12]

12. Under *Royce International Broadcasting*, 5 FCC Rcd 7063, 7063-64 ¶ ¶ 7-8 (1990), an applicant seeking comparative credit for its integration proposal has the burden of establishing the overall reliability of its integration proposal (that is, whether its described ownership structure accurately reflects the manner in which control will actually be exercised, thereby affording reasonable assurance that a nominally active owner's integration proposal will be carried out.) In this regard, the post-formation record is generally the most probative of who will control the ongoing licensee. However, where that record does not persuasively demonstrate that the nominally active owners will exercise exclusive managerial control, we also consider the pre-formation record. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991).

13. As we indicated in *Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 7001 n.6 (1991), recon. denied, FCC 92-303 (July 1, 1992), an applicant's reliance on a hired expert (e.g., an attorney, an engineer, or a site locator) is not fatal to finding that exclusive managerial authority rests with the nominally active owner(s) provided the record otherwise demonstrates the credibility of the applicant's integration proposal.[13] But in some situations such reliance may be consistent with a finding, based on the record as a whole, that the nominally active owner cannot be relied on to exercise exclusive managerial control over the applicant. *Id.*

14. Thus, we have held that "where the applicant's attorney plays a leading role in promoting the formation of an applicant ... this circumstance provides reason to closely examine the record to make certain that the nominal [sic] active owners truly control the applicant," particularly if such reliance results in the so-called owner being unfamiliar with critical aspects of the proposal. *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2498 & n. 3 (1991), appeal pending sub nom. *Kinney Group v. FCC*, No. 91-1271 (D.C. Cir. filed 6-5-91). Turning to the facts of this case, we find that Hillside has not met its

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[9] Cf. *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991), in which the Commission held that an applicant lacked reasonable assurance of funding because the loan agreement did not commit the lender to provide the entire amount needed to construct and operate but specified that he would advance funds in four distinct stages, and that he would approve each stage of the project before advancing any funds for the next stage.

[10] Radio-Vision claims that the agreement complies with the insulation standards set forth in *Ownership Attribution*. But attribution is warranted whenever the partnership agreement gives the limited partners authority that undermines their status as passive investors under *Anax*. That the agreement does so in a manner not previously encountered by the Commission is not a basis for avoiding attribution. See *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5600 ¶ ¶ 8-10 (1991), where interests were attributed despite the claim that the partnership agreement complied with the insulation standards in existence when the agreement was signed.

[11] Mario Baeza, employed by a New York City law firm, is far too busy to be more than a mere investor. Della Baeza, also an attorney, currently manages one of Mario Baeza's businesses full-time, but worked 5 years in ABC's legal department. While the initial $10,000 capital contribution to Hillside was shared equally by the Baezas, future contributions will be made 30% by Della Baeza and 70% by Mario Baeza.

[12] Morton Berfield advised Della Baeza that the frequency was available (*Decision*, ¶ 16). And it was Berfield, not Della Baeza, who retained the engineer, advanced funds to pay the engineer, drafted the partnership agreement, arranged for the publication of the public notices, located the transmitter site, and established Hillsides' public inspection file (*Id.*, ¶ 18). Indeed, Della Baeza never visited the inspection file or the transmitter sites (*Id.*). Nor had she ever received a bill from anyone other than Berfield, who paid all of Hillside's expenses directly and then sent itemized bills to Della Baeza (*Id.*). Hillside claims that Della Baeza prepared the station's budget, but in fact she questioned only one figure on a budget prepared by Berfield (*Id.*).

[13] Compare *Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 ¶ 7 (1991), aff'd by judgment, *Boedker v. FCC*, No. 91-1277 (D.C. Cir. 4/24/92), in which we held that the employment of a full-time manager is not a reason to diminish or totally discredit an otherwise sound integration proposal; *Susan M. Mulkey*, 4 FCC Rcd 5520, 5521 ¶ ¶ 7-8 (1989), in which we credited the integration proposal of a voting stockholder who had relied on her attorney but who actively prosecuted her application; *with Las Americas Communications*, 6 FCC Rcd 1507, 1510-11 ¶ ¶ 29-30 (1991), in which we discredited the proposed integration of an 88% stockholder, who showed little interest in the applicant, deferring instead to his stepfather, who was legal counsel for, but had no ownership interest in, the applicant. See also *Metroplex Communications*, 6 FCC Rcd 5610, 5612 ¶ ¶ 14-21 (1990), aff'd sub nom. mem. *Southeast v. FCC* (D.C. Cir. 1991), in which the attorney's involvement in arranging financing, in preparing the budget, and in hiring the engineer was a factor in discrediting an integration proposal.

burden of demonstrating that Della Baeza, the nominally active owner, will actually exercise control over the applicant.

15. Here, Hillside, which has the burden of establishing the reliability of its integration proposal, has presented no evidence of significant post-formation involvement by Della Baeza in prosecuting Hillside's application that would corroborate her claimed position as sole general partner with exclusive managerial control.[14] Because the post-formation record does not establish that Della Baeza, consistent with her stated position, has exercised and will continue to exercise such control, it is appropriate for us to consider the pre-formation conduct in evaluating the reliability of Della Baeza's commitment to be integrated into the day-to-day management of the station.

16. The pre-formation record confirms that, notwithstanding her formal designation as general partner and her proposal to be integrated, Della Baeza has not exercised the extent of managerial authority or been as intimately involved in formulating the applicant's proposal as we would expect of an owner proposing to be active in the station's daily management. Apart from questioning the level of her compensation, Della Baeza had no role in formulating Hillside's technical or financial proposal, and she is unfamiliar with the details of those proposals. Not only did Berfield hire Hillside's engineer, but Della Baeza testified that she had never met the engineer or visited the antenna site, and that, while she paid for engineering services, the bills were sent directly to Berfield. In this respect, her role was far less pervasive than that of the nominally active owner in *Susan M. Mulkey*, 4 FCC Rcd 5520 (1989), where the voting stockholder's post-formation involvement confirmed the reliability of the applicant's stated ownership structure and of the voting stockholder's integration proposal.

17. Indeed, the record reflects that Della Baeza relied on her attorney to handle all aspects of Hillside's formation and the prosecution of its application, and that she is woefully unfamiliar with virtually all significant phases of Hillside's proposal. This record of passivity by Della Baeza undermines the reliability of her commitment to exercise exclusive contol over the station consistent with her pledge to be integrated into station management on a daily basis.[15] Therefore, no comparative credit is warranted for Hillside's integration proposal under *Royce*, 5 FCC Rcd at 7064 ¶ 10.[16] We emphasize, however, that in discrediting Mrs. Baeza's integration proposal on this basis, we do not intend to jeopardize integration proposals whenever attorneys or other experts are involved. We remain convinced that, as we stated in *Fresno*, 6 FCC Rcd at 7001 n.6, "where the record as a whole demonstrates the overall reliability of the stated ownership structure, the owner's reliance on experts does not independently give rise to concern." Here, we have simply applied the established principle that credit is warranted only if the record reliably demonstrates that an owner will carry out its pledge to be actively involved in the day-to-day management of the station.[17] Given the record discussed above concerning Mrs. Baeza's complete passivity and lack of knowledge, Hillside has provided no basis for an affirmative finding that it has reliably demonstrated that Della Baeza's integration proposal merits any comparative credit.

18. However, we do not agree with the Review Board's conclusion (6 FCC Rcd at 931-32 ¶ ¶ 20-21) that Della Baeza's proposed integration is incapable of effectuation because Hillside did not affirmatively demonstrate the adequacy of the child care arrangements for the Baeza's two young children. Citing *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2435 (Rev. Bd. 1990), the Board held that Hillside had failed the "bedrock precept" that "every applicant has the burden of proof under the standard comparative issue, and must convincingly support each component element thereof" because "the married Hillside partners have not explored meaningfully the time demands on each, and mutually determined how *all* of these demands could be met simultaneously." 6 FCC Rcd at 931 ¶ 20 (emphasis in original).

19. After the Board's decision in this case, the Commission denied review in *Anchor*, 6 FCC Rcd 721, 724 n.3 (1991), remanded on other grounds sub nom. *Bechtel v. FCC*, 956 F.2d 873 (D.C. Cir. 1992), without "reach[ing] [or] relying on, the Board's findings with respect to Ms. Capobianchi's family obligations and child care arrangements." As in *Anchor*, the findings with respect to Della Baeza's family obligations are not decisionally significant

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[14] This case is distinguishable from *National Communications Industries*, 7 FCC Rcd 1703, 1705 n.3 (1992), where we rejected the argument that no credit was warranted for the proposed integration of a general partner who had played only a minimal role in prosecuting the application. There, however, the applicant purported to be a general partnership, and there was no question that someone other than a general partner was responsible for prosecuting the application. Thus, the claim that one of the general partners had a minimal role in prosecuting the application was not a basis for discrediting that partner's proposed integration because it did not raise a question as to the credibility of the applicant's organization as a *general* partnership.

[15] We clarify that Mrs. Baeza's deference to her attorney is not probative of her capacity to effectuate her integration proposal. To the extent that the Board (*Decision* ¶ ¶ 20, 22) suggests otherwise, it is expressly overruled. The issue is not whether Mrs. Baeza, having relied on her attorney thus far, is sufficiently familiar with Hillside's proposal to operate the proposed station. Rather, the issue under *Royce* is whether it is credible that Della Baeza, given her previous passivity, will exercise exclusive control over the station's daily operations.

[16] In discrediting Mrs. Baeza's integration proposal, we accord no special significance to the fact that her husband Mario is the proposed limited partner. Notwithstanding the Board's invitation that we consider the question of spousal attribution in the context of a limited partnership (*Decision*, ¶ 22 & n.5), we will not depart from our long-standing practice in integration cases of calculating separately equity interests held by spouses. See *Absolutely Great Radio, Inc.*, 104 FCC 2d 1, 5 ¶ 9 (1986). In doing so, we note that, for the purpose of applying the multiple ownership rules, we have adopted a Policy Statement eliminating the spousal attribution presumption and announcing our intention to treat the marital relationship like other close familial relationships (that is, the attribution determination depends on whether the facts indicate that the spouses' media interests are independent and that the spousal relationship is not being used to evade the ownership rules). *Clarification of Commission Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920, 1922 ¶ ¶ 12-13 (1992). Thus, in the absence of evidence of commingling of the Baezas' media interests, their marriage is not an independent basis for discrediting Della Baeza's integration proposal.

[17] See *Royce*, 5 FCC Rcd at 7063-64 ¶ ¶ 7-8; cf. *Rancho Mirage Radio*, 7 FCC Rcd 4337 (1992), recognizing that close scrutiny is warranted in assessing the reliability of two-tiered ownership structures.

because, as reflected above, there are adequate other bases for discrediting her integration proposal. Nevertheless, we take this opportunity to clarify that proof as to the adequacy of child care arrangements for the minor children of an owner proposing full-time integration is not a "component element" of such a proposal, particularly where, as in this case, the parent proposing to be integrated full-time is currently employed full-time outside the home. Such arrangements would be relevant only if the record contains sufficient evidence to shift the burden of proof back to the proponent of the integration proposal. No such evidence appears in the record of this case. Thus, while we uphold the Board's decision to discredit totally Hillside's integration proposal, we hold that the Baezas' child care arrangements are not a basis for discrediting that proposal.

20. *D&L's Integration Proposal:* Organized as a general partnership, D&L sought 100% quantitative credit for the proposed full-time integration of its two general partners, Reginald N. Lavong (51% equity interest) and Sandra DelGiorno (49% equity interest), as general manager and community relations director, respectively. Based upon Lavong's dominant role in forming the partnership and DelGiorno's testimony that she would defer to Lavong on station policy and programming, the ALJ found that DelGiorno did not have a *bona fide* role in the D&L partnership and that D&L's ownership structure is a sham not meriting any comparative credit. 5 FCC Rcd at 3396 ¶¶ 59-62.

21. Finding that 49% owner DelGiorno would not have any meaningful role in the day-to-day operation of the station, the Review Board "easily affirm[ed]" the ALJ's rejection of any credit for DelGiornio's proposed integration. 6 FCC Rcd at 933 ¶ 29. Because the Review Board concluded that D&L would not prevail even if Lavong's 51% integration were credited, the Board did not consider whether Lavong's proposal should also be discredited because D&L's ownership structure is an utter sham under *Royce*, 5 FCC Rcd at 7063 ¶ 7. *Id.* We agree that DelGiorno's proposed role entails no managerial or policymaking duties warranting any integration credit. But, as set forth below, we find no question as to the "overall reliability" of D&L's ownership structure under the principles reaffirmed in *Royce*, 5 FCC Rcd at 7063-64 ¶ 8. We therefore award 51% credit for Lavong's proposed integration.

22. While the applicant has the burden of demonstrating that "[its] described ownership structure accurately reflects the manner in which control will be exercised," *id.*, concerns about the *bona fides* of an integration proposal -- that may result in the denial of any integration credit -- arise when there are "more far-reaching questions about where control of an applicant lies." *Id.* at ¶ 10. By the same token, only partial credit is due if there is a question as to the exercise of control by both purportedly passive and purportedly active owners. *Id.* at ¶ 9. There are no such questions here. This is not a two-tiered ownership structure raising "questions about the allocation of control as between integrated and nonintegrated owners." *Id.* at 7063 ¶ 5. Both general partners purport to be active, and there is no allegation that someone besides DelGiorno and Lavong has an ownership interest in, or will be in a position to exercise significant control over, the applicant.[18] *Royce* at ¶ 10.

23. Nor is there any question that DelGiorno, having agreed to contribute 49% of the partnership's expenses in exchange for 49% equity, is a *bona fide* owner. Thus, despite the alleged deficiencies in D&L's partnership agreement and Lavong's dominant position, both DelGiorno and Lavong are true and actual owners proposing day-to-day involvement in the operation of the station. That D&L is organized as a general, rather than as a limited, partnership as well as the facts that its prime mover, Reginald Lavong, has a significant equity interest in D&L and proposes to be integrated full-time distinguishes D&L's proposal from that of Hillside.[19] Neither Sandra DelGiorno's passivity[20] nor the fact that her proposed position does not entail the managerial or policymaking responsibility necessary to qualify for integration credit under the *1965 Policy Statement* is a basis for disregarding Lavong's proposed integration as general manager. Thus, D&L's integration proposal merits 51% quantitative credit.

24. *Site Availability:* With 51% quantitative integration credit, D&L is the prevailing applicant because, as reflected above, Radio Vision, deserves only 20% quantitative integration credit. We therefore turn to the site availability issue. As reflected below, undisputed facts reflect that D&L, having selected a site on publicly owned land, approached the appropriate city officials, who outlined the procedures which the city must follow if it decided to lease the site and who indicated their willingness to structure the public bidding process so as to clearly identify the site for use as a FM tower; that the city has not rejected that proposal; and that the city is legally barred from affording D&L more definite assurance of the tower's availability. Based upon those undisputed facts, we find that the ALJ properly granted a motion for summary decision on this issue. We therefore reverse that portion of the Board's decision (6 FCC Rcd

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[18] Cf. *Rancho Mirage Radio*, 7 FCC Rcd 4337 ¶ 8 (1992), in which we recognized that we are somewhat more lenient where the applicant does not propose a two-tiered ownership structure. See also *HS Communications*, 8 FCC Rcd 3237 n.3 (1993), in which we recognized that *Royce* ¶ 10 is not controlling in cases that do not involve a two-tiered ownership structure.

[19] *Northampton Media Associates*, 3 FCC Rcd 5164, 5171 ¶ ¶ 39 (Rev. Bd. 1988), review denied, 4 FCC Rcd 5517 (1989), appeal pending sub nom. *Northampton Media Associates v. FCC*, Case No. 90-1291 (D.C. Cir. filed June 5, 1990), cited by Radio Vision, is also inapposite. There, an integration proposal whereby all three general partners would be integrated was discredited. However, the record reflected that two of the "general partners" were not true and actual owners inasmuch as they had contributed no money to the partnership and would incur no future financial obligation.

[20] The record reflects that DelGiorno deferred to general partner Lavong in the selection of the attorney (Tr. 1275), and the engineer (Tr. 1261, 1296-97); that she had no role in locating the transmitter site (Tr. 1276, 1311) or in preparing the budget (Tr. 1276, 1309, 1310) or the application (1310, 1324); and that DelGiorno's only independent action was the compilation of the EEO program.

at 936 n.6) concluding that substantial and material questions of fact remain as to the suitability and availability of D&L's proposed transmitter site.[21]

25. *Background:* Several applicants, including D&L, specified a transmitter site located on land owned by the City of Brigantine. In certifying reasonable assurance of a transmitter site, the applicants relied upon a letter from the Brigantine City Solicitor expressing the city's willingness to sell or to lease the property for the erection of an FM transmitter tower. The letter explained that, while the city is considering the sale or lease of the property, such sale or lease would, pursuant to New Jersey law, be open to public bidding and would be awarded to the highest bidder. It noted further that use of the land in question would be subject to approval by the city's three member Board of Commissioners. Thus, the letter cautioned that "the City does not intend this letter to be construed as a commitment to enter into private negotiations with interested parties or as an acceptance of any offers previously made; but, is to be used by interested parties solely for the purpose of understanding the procedures which the City of Brigantine will implement should it decide to sell or lease municipally owned lands."

26. Finding that the city had not authorized the sale or lease of the land designated by D&L, the Mass Media Bureau concluded that there was no reasonable assurance of its availability and specified a site availability issue against the applicants specifying the Brigantine land. *Hearing Designation Order*, 3 FCC Rcd 5595 5596 ¶ ¶ 2-4 (1988). In doing so, it rejected the argument that, having done everything in their power to "affirm acceptable 'reasonable assurance,'" the applicants had reasonable assurance of the site under the standard enunciated in *Arizona Number One Radio, Inc.*, 103 FCC 2d 550 (Rev. Bd. 1986), review denied, 2 FCC Rcd 44 (1987). The Hearing Designation Order also relied on the Board's opinion in *Alden Communications*, 102 FCC 2d 518, 519 (Rev. Bd. 1985), which had held that the reasonable assurance standard is the same for publicly owned and for privately owned land.

27. Prior to the hearing, however, the Commission reversed the Board in *Alden*, stating that:

> Where an applicant is dealing with a government agency that is unwilling or unable to make less than a legally binding commitment, and where the record contains no explicit rejection of the applicant's proposal, a mere willingness by the government agency to entertain a request for use of the land in question is sufficient to provide reasonable assurance of the site's availability.

Alden Communications Corp., 3 FCC Rcd 3937, 3938 ¶ 10 (1988). Citing *Alden*, the Brigantine applicants requested that the ALJ delete or certify the site issue to the Commission. The ALJ denied that request, noting his lack of authority under 47 C.F.R. § 1.115(e)(3) to take such action in the absence of an uncertainty about a controlling question of law. *Memorandum Opinion and Order*, FCC 88M-4429 ¶ ¶ 4-5 (released December 30, 1988). He found no such uncertainty since the Bureau had applied the appropriate standard in designating the issue, and since its assessment of facts would be tested at hearing.

28. However, the ALJ later granted a Joint Motion for Summary Decision on the site issue, finding, based on correspondence from the Brigantine City Solicitor and City Administrator that "no genuine issue of material fact remain[ed] for determination at the hearing" on the site availability issue. *Memorandum Opinion and Order*, FCC 89M-1469 (released May 17, 1989). In the ALJ's view, the pre-certification representations of the city solicitor and of the city administrator concerning the city's willingness to lease the land for a broadcast tower "form[ed] the basis for reasonable assurance by the moving parties." Order, at ¶ 8.

29. In finding that D&L had reasonable assurance of the publicly owned land, the ALJ also cited post-certification statements from the Mayor confirming that the land was suitable, that it had not been committed to any other use, that he was not aware of any city decision "that would be adverse with respect to zoning which would not allow ... an FM transmitter site," and that permits that must be obtained from other agencies could be obtained. Nonetheless, he warned that further preliminary assurance of the site's availability is impossible, given the procedures that the city is required to follow once it decides to sell or to lease the site.

30. From these statements, the ALJ inferred that "the city appear[ed] willing to entertain a request for use of the land." Finding that the city is "unwilling and unable to make a less than legally binding commitment," but that it had not rejected D&L's tower proposal, the ALJ concluded that the applicants had reasonable assurance of the Brigantine site under *Alden* even though the city had not made an affirmative decision to lease the site. In granting the motion for summary judgment, the ALJ rejected the claim that *Alden* was distinguishable because of the requirement in this case that the land must be made available through a public bidding process.

31. Hillside -- which had opposed summary decision before the ALJ -- challenged the ALJ's ruling in its exceptions. Without discussing those exceptions or stating any reason for its ruling, the Board held that "substantial and material questions of fact remain as to the availability and suitability of D&L's proposed transmitter site (see Exceptions of Hillside Broadcasting at pp. 3-13); and if D&L were a viable applicant, this proceeding would otherwise be remanded for additional hearings on this matter." 6 FCC Rcd at 936 n.6. In its application for review, D&L urges that the ALJ properly granted summary decision, inasmuch as the applicants specifying the Brigantine site had done everything legally possible to obtain reasonable assurance.

32. *Discussion:* We agree with D&L that the ALJ properly granted summary decision on the site issue. As an initial matter, we reject Hillside's contention that the ALJ's rulings on the motion to delete or certify the site issue and on the motion for summary decision are inconsistent. In denying the first request, the ALJ had relied

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[21] Atlantic Wireless specified the same site as D&L, and an identical site issue was designated against it. We therefore reverse the Board's similar finding (6 FCC Rcd 936 n.7) with respect to Atlantic Wireless' proposed site. However, we affirm without modification the Board's analysis awarding at most 30% credit for Atlantic Wireless' integration proposal. Thus, while it is fully qualified, Atlantic Wireless is comparatively inferior to D&L.

on his very limited authority under section 1.115(e)(3) to delete or certify an issue designated by the Mass Media Bureau. That provision does not authorize him to undertake an independent evaluation of the issue, but only to act in the case of substantial uncertainty about a controlling question of law. Because our decision in *Alden* did not eliminate the fundamental requirement that an applicant must have reasonable assurance of its antenna site, the ALJ found no such uncertainty here.

33. In contrast, summary decision is appropriate under 47 C.F.R. § 1.251(a)(1) if the party seeking summary decision shows that "there is no genuine issue of material fact for determination at the hearing." Ruling on such a motion requires that the ALJ undertake an independent assessment of the matters before him. In other words, the issue before the ALJ was different from that raised by the earlier request to delete or certify the site issue. Thus, the ALJ's determination that there is no genuine issue of material fact left to be decided at the hearing is not inconsistent with his refusal to delete or certify the site issue.

34. Turning to the merits, we affirm the ALJ's grant of the motion for summary decision. As Hillside notes, summary decision may be granted only if the basic facts are undisputed, "and the parties are not in disagreement regarding material factual inferences that may properly be drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975).

35. Here there are no material facts in dispute. The facts reflect a clear willingness by the city -- both prior to certification and currently -- to entertain D&L's requested use of the land. Before certifying reasonable assurance, one of the applicants designating the Brigantine site obtained letters from two city officials. A letter, dated July 20, 1987, from the City Solicitor, William E. Gasborro, affirmatively indicated that he wanted to continue discussions about the use of the city's land for a broadcast tower.[22] And, on August 24, 1987, D&L received a letter from the City Administrator, George E. McDermott (who was later identified by the Mayor as the city's contact person on the tower question).[23] Enclosed was a map "on which [McDermott] ha[d] marked an X in red indicting (sic) location for a proposed antenna site at the north end of Brigantine." D&L's Reply Exceptions, Attachment No. 1, at 1. Also attached to the McDermott letter was a second letter from the Solicitor, dated August 18, 1987, which McDermott characterized as "expressing the City's willingness to lease said property." Attachments Nos. 1 and 2.

36. On September 23, 1987, immediately following the release of the Hearing Designation Order, D&L's technical consultant, Laura M. Mizrahi, again contacted McDermott. Although McDermott confirmed that, as reflected in the Solicitor's August 18 letter, the site would be open to public bidding and awarded to the highest bidder, he told Mizrahi that "it was his belief that the City would be willing to structure the bid process to clearly identify the purpose of leasing the land for construction of an antenna site ... [but] that the bid structuring ... would not occur until after a grant of a construction permit had been made by the FCC to one of the applicants." Declaration of Laura M. Mizrahi, at 2-3.

37. In a letter to the ALJ, dated March 6, 1989, Mayor Kline confirmed the continuing availability of the publicly owned land, but he explained that "[u]nder the procedures required when a municipality sells land, the successful bidder must bind itself to fulfill the terms of its bid if the bid is accepted" (that is, regardless of whether it gets the FM permit). D&L's Reply Exceptions, Attachment No. 3 at 2. The Mayor indicated further that, while he could not guarantee the availability of permits from other jurisdictions or that the city would decide to lease the land, the land had remained undeveloped for years and he was not aware of any plan for the land or zoning decision that would preclude its use as an FM transmitter site.[24]

38. Notwithstanding Hillside's arguments to the contrary, the absence of an affirmative decision by the city to sell or lease the site in question is not fatal to D&L's claim of reasonable assurance. In *Alden*, we found a "willingness to entertain a request for use of the land" sufficient to confer reasonable assurance even though the state of Arizona had not determined to lease the land. That willingness was demonstrated by statements from appropriate officials that the land was available for commercial lease, and that a formal application would be accepted and processed.

39. Here, the pre-certification statements of the City Administrator and the City Solicitor expressed a willingness to entertain D&L's tower proposal, even to the point of suggesting that the bidding process could be structured so as to clearly identify the land for use as an FM tower. That willingness was not undermined by the Mayor's later statements. While cautioning that the City had not decided to actually lease the land and that there was no guarantee that it would do so, the Mayor nevertheless confirmed that the land was available, that no other use was contemplated for the land, and that he was unaware of any restrictions that would preclude its use as an FM transmitter tower.

40. That the Brigantine City Commissioners must ultimately decide to lease the land is analogous to a situation in which a zoning change is needed to secure the site for broadcast use. Under those circumstances, a site issue is

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[22] That the letters were not addressed to D&L directly is not fatal to its claim of reasonable assurance. See *Warren Price Communications*, 5 FCC Rcd 2906, 2908 ¶ 21 (1990), in which we rejected the claim that, in the case of publicly owned land, only the applicant that had initially established the National Park Service's willingness to allow broadcast facilities at the Fire Island had reasonable assurance of the site.

[23] McDermott's letter was prompted by a phone call to the mayor's office made by D&L's technical consultant on August 21, 1992. See D&L's Reply Exceptions, Attachment No. 2, at 1-2. The phone call was made at the suggestion of the City Engineer, Matt Doran, and the Zoning Administrator, Ed Kasky, who had been contacted by the consultant. *Id.* at 2.

[24] The ALJ properly rejected the argument that any assurance afforded by the Solicitor's original pre-certification letter was undermined by an 1988 letter from the Mayor, which characterized the Solicitor's original letter as a mere form letter intended to apprise interested parties of the procedures that the city was required to follow once it decided to lease the site. A pre-certification letter from the City Administrator, who was identified in the Mayor's March 1989 letter as the city's contact person about the site, had described the Solicitor's letter as "expressing the city's willingness to lease."

warranted only upon a showing that a majority of the officials authorized to grant a zoning variance oppose such action. *Warren Price Communications*, 7 FCC Rcd 4344, 4345 ¶ 7 (1992), citing *Kenter Broadcasting Co.*, 62 RR 2d 1573, 1578 (1986). Here, however, there has been no showing that either the Mayor or the other two Brigantine City Commissioners is opposed to leasing the site. Rather, the statements of the Mayor and of the official identified by the Mayor as the city's contact about the tower question expressed a willingness to entertain D&L's tower proposal.

41. D&L's claim of reasonable assurance is not undermined by the fact that such sale or lease would be subject to open public bidding fatal to D&L's claim of reasonable assurance. In *Warren Price Communications*, 5 FCC Rcd 2906, 2908 ¶ ¶ 20-21 (1990), we determined that competing applicants had reasonable assurance of a site at the time of certification even though the designated site was subject to a competitive bidding process mandated by the National Historic Properties Act; they lost such assurance only after the site was opened to comparative bids and they failed to submit a bid. *Id.* at 2209 ¶ ¶ 22-23.

42. As in this case, the publicly owned land in *Warren Price* could be leased only through a public bidding process. Thus, the land "owner" was legally prohibited from making a commitment to lease to any particular applicant. Nevertheless, the applicants had reasonable assurance as long as they were eligible to compete for the right to lease the specified site. In other words, they were entitled to rely on the site under these circumstances until the National Park Service formally rejected their proposals. 5 FCC Rcd at 2209 ¶ ¶ 22-23.

43. Here the city has not yet conducted the competitive bidding process required by municipal ordinance to select a leasee for the site. Thus, as in *Warren Price*, D&L's proposal to construct a station on a publicly owned site has not been formally rejected by the City of Brigantine. Rather, the city has indicated that it is willing to consider such use, but that it is legally barred from making less than a binding commitment to permit such use or to lease to a particular applicant. By contacting the appropriate city officials prior to certification and discussing with them the city's willingness to consider its proposal to construct an FM antenna on city land, D&L had taken all steps possible to secure permission to use the site. Short of entering into a legally binding contract for the land -- which D&L clearly need not do under the criteria set forth in *Alden* to establish reasonable assurance -- D&L cannot obtain more definite assurance that the site is availability. Based on these undisputed facts, we therefore conclude that D&L has reasonable assurance of its proposed transmitter site, that the ALJ properly granted summary decision on this issue, and that the grant of its application would best serve the public interest.

44. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the Application for Review filed on March 18, 1991 by Hillside Broadcasting Limited Partnership IS GRANTED; that the Applications for Review, filed on March 18, 1991 by D&L Broadcasting, and on March 20, 1991 by Atlantic City Community Broadcasting, Inc. ARE GRANTED in part and DENIED in part; that the Application for Review, filed on March 19, 1991 by Atlantic Wireless Broadcasting Limited Partnership IS DENIED; and that the Review Board's Decision, *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925 (Rev. Bd. 1990), IS MODIFIED, as reflected herein.

45. IT IS FURTHER ORDERED, That the application filed by D&L Broadcasting (File No. BPH-870827NC) IS GRANTED; and that the applications filed by Radio-Vision Communications II, Limited Partnership (File No. BPH-870827MF), Atlantic City Community Broadcasting, Inc. (File No. BPH-870826ME), Atlantic Wireless Broadcasting Limited Partnership (File No. BPH-870827MO), and Hillside Broadcasting Limited Partnership (File No. BPH-870827MK) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of WNYC	CSR-3748
Communications Group against	NY0254
Time Warner New York City	
Cable Group	

Petition for Stay

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1993; Released: June 30, 1993

By the Chief, Mass Media Bureau:

1. On June 18, 1993, Time Warner New York City Cable Group ["Time Warner"] filed a "Petition for Stay Pending Application for Review"[1] of the Bureau Chief's decision in *Complaint of WNYC Communications Group against Time Warner New York City Cable Group*, 8 FCC Rcd _____ (1993) ["*Complaint of WNYC*"]. In that decision, the Bureau Chief upheld the right of Station WNYC-TV (Educ. Channel 31), New York, New York, to continued carriage on Channel 3 on Time Warner's cable systems serving the Borough of Manhattan in New York City. WNYC Communications Group ["WNYC-TV"], the station's licensee, has opposed Time Warner's petition for stay.

2. In support of its petition for stay, Time Warner argues that it meets the necessary criteria: (1) it is likely to prevail on the merits; (2) absent relief, it will incur irreparable injury; (3) stay will not substantially harm other interested parties; and (4) the public interest favors a stay. Moreover, Time Warner argues, it need only make a substantial case on the merits if the latter three requirements strongly favor stay, citing *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Time Warner claims that it is likely to prevail on the merits, because: (1) Time Warner plans to integrate all its systems in all of New York City's boroughs, and Time Warner's shift of WNYC-TV from carriage on channel 3 in Manhattan to channel 31 promotes uniform carriage throughout New York City and minimizes subscriber disruption; (2) WNYC-TV does not qualify as a noncommercial educational station; (3) not qualifying as a noncommercial educational station, WNYC-TV's carriage rights do not become effective until October 6, 1993, rendering the Commission's order premature; and (4) the decision in *Complaint of WNYC* implicates the first amendment. Time Warner alleges that it will be substantially harmed absent stay, as it expended over $800,000 in moving the station to channel 31 and informing the system's subscribers of the change. At the same time, Time Warner contends that WNYC-TV will not be irreparably harmed by a stay, as the channel repositioning has actually increased WNYC-TV's cable audience,[2] and a further repositioning would cause subscriber confusion. Finally, Time Warner claims that the public interest favors a stay, as repositioning of WNYC-TV to channel 31 has ameliorated subscriber confusion over WNYC-TV's being on channel 31 on every Time Warner cable system in New York City except in Manhattan.

3. WNYC-TV argues that Time Warner is not likely to succeed on the merits of its application for review because: (1) Time Warner does not yet have a single, city-wide New York City cable system and, if it did, WNYC-TV could request carriage on channel 3 throughout such system; (2) WNYC-TV is a qualified local noncommercial educational station; and (3) the constitutionality of the mandatory carriage rights established in the Cable Television Consumer Protection and Competition Act of 1992 ["the Cable Act"] was upheld in *Turner Broadcasting System, Inc. v. FCC*, Civil Action No. 92-2247 (D.D.C. April 8, 1993) (three-judge court). WNYC-TV states that Time Warner's violation of WNYC-TV's rights substantially harms the station, while denial of stay will not irreparably injure Time Warner, which chose to expend the monies it did despite WNYC-TV's pending complaint. WNYC-TV argues that the Bureau Chief correctly found in *Complaint of WNYC-TV, supra*, that the public interest favors granting WNYC-TV its requested relief, not forestalling it.

4. We will deny Time Warner's petition for stay. Time Warner does not raise a substantial case on the merits. Whatever Time Warner's future plans may be, it does not now have a single, city-wide cable system serving New York City.[3] Nor does Time Warner acknowledge that it is not merely the terms of subsection (a) of §73.621 of the Commission's Rules that defines a qualified noncommercial educational station in §76.55(a)(2) of our Rules, but rather the entirety of §73.621 of our Rules governs. *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2966 n.7 (1993). WNYC-TV is a qualified local noncommercial educational station, and thus the decision in *Complaint of WNYC-TV, supra*, is not premature. Moreover, the constitutionality of the Cable Act's mandatory signal carriage provisions has been upheld. *Turner Broadcasting System, Inc. v. FCC, supra.* Time Warner has not shown that it will incur irreparable injury absent a stay. Time Warner's cited expenses are for all of its New York City systems, for announcements of realignment of introductions of at least thirty channels. Time Warner fails to demonstrate that whatever portion of these costs attributable to Time Warner's decision to reposition WNYC-TV on Time Warner's Manhattan systems -- a choice made by Time Warner in the face of WNYC-TV's protests and complaint -- cannot be re-

[1] Time Warner's application for review was filed on June 21, 1993.

[2] Time Warner asserts that a Nielsen study indicates that WNYC-TV gains a greater audience on cable channel 31 than on cable channel 3 in Manhattan. Time Warner does not submit the actual study.

[3] Indeed, this is the first time that Time Warner raises this issue. We note that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. §1.115(c).

couped. "Mere injuries, however substantial, in terms of money . . . are not enough." *Virginia Petroleum Jobbers Association v. FCC*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See also Big Valley Cablevision, Inc.* 85 FCC 2d 973, 979 (1981). At the same time, WNYC-TV does suffer substantial harm from Time Warner's violation of the station's on-channel carriage rights. Finally, the public interest does not favor stay in this instance. Time Warner submits no evidence of viewer confusion prior to its unilateral repositioning of WNYC-TV in the face of the station's legitimate carriage requests, nor can parties rely on their own erroneous interpretations of statutes and our rules as a basis for relief. *See, e.g., City of Sterling, Colorado,* 5 FCC Rcd 1991 (1990), *recon. denied,* Cable Television Actions Report No. 3325 (released March 6, 1991), *review denied,* 7 FCC Rcd 6752 (1992).

5. In view of the foregoing, we find that grant of Time Warner's petition for stay is not in the public interest.

6. Accordingly, IT IS ORDERED, That the petition for stay filed June 18, 1993, by Time Warner New York City Cable Group IS DENIED. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1327 **Released: July 1, 1993**

Request for Waiver of Section 319(d)

SATELLITE CD RADIO, INC. File No. 47-DSS-MISC-93

Satellite CD Radio, Inc. (Sat CD) has filed a request for waiver of Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), to begin construction of its proposed Digital Audio Radio Service (DARS) satellites. Sat CD filed an application, and subsequent amendments, to construct, launch and operate two DARS satellites. [*See* File Nos. 49/50-DSS-P/LA-90, 58/59-DSS-AMEND-90, 8/9-DSS-AMEND-92, 12/13-DSS-AMEND-92, and 44/45-DSS-AMEND-92; *see also* Public Notice, Report No. DS-1151 (December 18, 1991) and Publice Notice, Report No. DS-1244, 7 FCC Rcd 6763 (1993).] By this request, Sat CD is seeking authority to spend up to $10 million at its own risk over a period of 10 months in order to begin construction of its DARS satellites.

Comments or Petitions are due on or before **July 16, 1993**. Responses are due on or before **July 23, 1993**.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-338

In re Applications of

ARTICHOKE BROADCASTING CORPORATION	File No. BPH-860917MG
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-860918NZ
Julio A. Villamil, Maria Elena Villamil, Lawrence M. Wrathall and Nayereh E. Wrathall d/b/a VILLAMIL FM RADIO	File No. BPH-860918OL[1]
CALIFORNIA COMMUNITY TELEVISION NETWORK	File No. BPH-860918OO

For Construction Permit for
a New Commercial FM Station
Salinas, California

Appearances

Seymour M. Chase, Esq. on behalf of Artichoke Broadcasting Corporation; *Kathryn R. Schmeltzer, Esq.* on behalf of Crystal Communications, Inc.; *Christopher D. Imlay, Esq.* on behalf of Villamil FM Radio; *Dennis J. Kelley, Esq.* on behalf of California Community Television Network; and *James W. Shook, Esq.* on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: June 11, 1993; Released: July 9, 1993

By the Review Board: MARINO (Chairman), and GREENE.[2] Board Member BLUMENTHAL not participating.

Board Chairman MARINO:

1. This present four-party comparative case returns to the Review Board following remand in *Salinas Broadcasting, L.P.* (Remand Order), 5 FCC Rcd 1613 (Rev. Bd. 1990), and a *Supplemental Initial Decision* (SID) of Administrative Law Judge Edward Luton (ALJ), 7 FCC Rcd 4065 (1992), which denied all other applicants save Villamil FM Radio (Villamil). A remand hearing was ordered to determine whether five applications, Artichoke Broadcasting Corporation (Artichoke), Crystal Communications, Inc. (Crystal), California Community Television Network (California Community), and two other applications which were later dismissed voluntarily, "have a reasonable assurance of obtaining permission from the appropriate local authority for the construction of their proposed towers, antenna systems, and transmitter buildings at the Buena Vista site specified in their applications." 5 FCC Rcd at 1614 ¶ 6. Only Villamil's application did not propose to use the objectionable Buena Vista site.

2. To meet the remand issue, Crystal and California Community, prior to hearing, elected to remain at the Buena Vista site but sought and were granted leave to use "a shorter and slimmer self-supporting tower." Artichoke sought and was granted leave to move to a new site and to reduce its tower's height. SID, ¶ 1. Villamil, the fourth remaining applicant, learned after the remand that its former site was no longer available, and it also sought and was granted leave to amend to a new site. *Memorandum Opinion and Order*, FCC 90M-1436, released June 1, 1990.

3. All four remaining applicants have filed exceptions to the ALJ's resolution of this case on remand, which raise two decisional issues: (a) Did the presiding Judge err in permitting the engineering amendment of Artichoke, California Community, and Crystal post-remand? Villamil Contingent Exceptions, p. 12; and (b) Whether the ALJ committed error by not adding an issue to ascertain if Villamil had misrepresented the availability of its original site, Crystal Exceptions, p. 10, and by "accepting a curative amendment from Villamil specifying a new transmitter site where Villamil had failed to amend its application in 30 days from the time it learned of the loss of its original site" (California Community Exceptions pp. 6-7). We agree with the parties that resolution of the amendment issues is controlled by *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991) (subsequent history omitted), and similar cases, which hold that if an applicant seeks to amend after designation for hearing and does not satisfy the more stringent good cause requirement for engineering amendments, its amendment will be denied and the application dismissed. *See also Imagists*, 8 FCC Rcd 2763 (1993), for the Commission's recent comprehensive review of the legal principles applicable to post-designation amendments. Villamil's application will be granted for the reasons set out below.

THE BUENA VISTA SITE

4. Our previous review of this case established that, in their original applications filed September 17, and 18, 1986, all of the remaining applicants, except Villamil, proposed the Buena Vista transmitter site some five miles from Salinas, California, in or near the Toro Regional

[1] On our own motion, we are amending the heading of this proceeding to include corrected application file numbers for Villamil FM Radio and California Community Television Network.

[2] Board Member Greene, who was not a member of the Board at the time of the oral argument in this proceeding, has read the transcript of that session in accordance with 47 CFR 1.277(f).

Park. FCC Application Form 301, Question 16, and its Instructions, and related FCC Rules, 47 CFR § 1.1305 and § 1.1311, *inter alia* required:

> A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect; and
>
> A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

Moreover, the Commission, in amending its *Environmental Rules* (*Report and Order*), 60 RR 2d 13, 17-18 (1986) (footnotes omitted), had recently noted:

> [A]esthetic concerns may more appropriately be resolved by local, state, regional or local land use authorities. Those authorities can better handle such questions given their experience and familiarity with land use values. Accordingly, in considering any objections based upon aesthetic concerns, due recognition and considerable weight will be accorded to the fact that site approval has been obtained from a local, state, regional or federal land use board or agency, if that approval has taken into account the environmental impact of the proposal.

In sum, the Commission encouraged "applicants to seek approval from the appropriate land use agency prior to coming to the Commission." *Id.* at 17 n. 16. *See also Salinas Broadcasting, L.P.*, 4 FCC Rcd 8325, ¶ 2 (Rev. Bd. 1989).

5. After the applications had been designated for hearing, Villamil filed a Petition to Enlarge Issues on April 21, 1988 to add site availability issues against all the other applicants, claiming that the commonly-proposed Buena Vista site violates the Monterey County General Plan and the Toro Area Master Plan ordinances and, therefore, is unlikely to receive local approval prerequisite to tower construction. In particular, Villamil alleged that the proposed site is strongly opposed by the Monterey County Planning Department as inconsistent with local ordinance restrictions on ridgeline development and visual impact; by the Monterey County Airport Land Use Commission and the Manager, Salinas Municipal Airport as creating excessive noise and safety hazards; and by a local property owners association and several local residents as an unacceptable obstruction to the scenic landscape. These allegations were supported by a personal knowledge affidavit and by correspondence from officials of the various local governmental organizations mentioned above. Enlargement of the issues was denied by the ALJ (*Order*, FCC 88M-3025, released September 14, 1988), who held that: "Villamil ha[d] shown... that any requests to the Planning Commission for the use of a transmitter site are very likely to be opposed, perhaps strenuously," but that Villamil had not submitted any indication from the Planning Commission itself that approval was unlikely. *See also Salinas, supra*, 4 FCC Rcd at 8326, ¶ ¶ 4-7.

6. On review of Villamil's original exception to the ALJ's refusal to add a site issue, the Board first asked the Mass Media Bureau and other parties to supplement the record. *See Salinas, supra*, 4 FCC Rcd 8325. On further review of the supplemented record, the Board concluded that (Remand Order, 5 FCC Rcd at 1614):

> the facts here are more closely analogous to *Teton Broadcasting*, [1 FCC Rcd 518, 519 (1986),] where a site issue was added on evidence that the chairman of the local board indicated that site approval was not likely to be forthcoming. The facts alleged here take the Buena Vista site beyond the merely questionable, and we believe that Villamil has made the "reasonable showing" required [by *Teton, supra*].

Since a substantial and material question of fact remained to be resolved about the Buena Vista site, the case was remanded to the presiding officer (*id.*):

> To determine whether ... Artichoke Broadcasting Corporation, ... Crystal Communications, Inc., and California Community Television Network have a reasonable assurance of obtaining permission from the appropriate local authority for the construction of their proposed towers, antenna systems, and transmitter buildings at the Buena Vista site specified in their applications.

7. To resolve the remand issue, Crystal (and the two applicants who subsequently dismissed their applications) engaged a California engineer to investigate the problem. Crystal Exceptions p. 3. The consultant first looked to the Villamil site but learned that it was no longer available. Thereafter, on May 9, 1990, Crystal filed a petition for leave to amend proposing to remain at the Buena Vista site but utilizing "[a] shorter and slimmer self-supporting tower that will be hidden from view by one or more nearby trees and surrounding terrain." *Id.* Artichoke filed a petition for leave to amend its application on June 1, 1990, to change to a new site "allegedly" outside the Toro area scenic easement. And California Community filed a petition for leave to amend, on July 5, 1990, proposing to reduce its tower height at the Buena Vista site in the same manner as Crystal.

8. Villamil opposed Crystal's petition for leave to amend on May 18, 1990, Artichoke's petition on June 15, 1990, and California Community's petition on July 16, 1990, urging that the good cause requirements of *Erwin O Conner Broadcasting*, 22 FCC 2d 140 (Rev. Bd. 1987) and Section 73.3522(b)(1) of the Commission's Rules had not been met by the three applicants. Their lack of good cause, Villamil argued, was attributable to their failure, prior to filing their applications, to investigate the proposed site to ascertain if any environmental zoning problems existed. Had they conducted a reasonable investigation as required by the Commission, they would have discovered the existence of local regulations which showed that "there was no possibility of a waiver." In a *Memorandum Opinion and Order*, FCC 90M-1843, released June 27, 1990, the ALJ granted Crystal and Artichoke's petitions for leave to amend. Generally, the ALJ agreed with the amending applicants' argument that under well-settled Commission policy: "An applicant need not have the advance approval of governmental authorities in order to have reasonable assurance of site availability. ... Indeed, such approval need not even have been requested at the time that the application is filed." *Id.* at p. 15. From these propositions, he reasoned that: "there was no requirement

on the part of any applicant herein to either look for or discover an improbability of obtaining site approval"; therefore, the amending applicants cannot be faulted on this account, and the amendments were diligently filed after the Review Board's specification of the issue. *Id.* at p. 16. Subsequently, by *Memorandum Opinion and Order*, FCC 90M-2417, released August 7, 1990, the ALJ granted California Community's later petition for leave to amend, holding that its amendment will be accepted "upon the same rationale as that stated" in his earlier ruling, *supra*, FCC 90M-1843.

9. Villamil argues in Contingent Exceptions, at pp. 12-16, that the ALJ's rationale for granting leave for Crystal, Artichoke, and California Community to amend their applications is legally flawed. First, Villamil asserts that these amendments were necessitated by those applicants' "negligent failure to investigate the land use and environmental circumstances in 1986" as required by Commission pronouncements. The amending applicants, according to Villamil, "failed at their peril to heed the Commission's admonitions as to the importance of appropriately considering environmental public interest factors." *Id.* at p. 13. *See also* ¶ 4, *supra*. Accordingly, it is submitted the ALJ's ruling misses the point that prior to filing their applications in 1986, the applicants never did anything to determine the environmental consequences, and instead "falsely stated" in their applications that "there would be no environmental consequences without any inquiry whatsoever." Contingent Exceptions, p. 14.

10. Second, Villamil argues that, as the Board recognized in its remand order, its petition to enlarge issues filed April 21, 1988, raised these matters, "thus clearly providing notice to those applicants about the problems with their engineering proposals." The amendments in question were not filed until May, June and July of 1990, more than two years later. Accordingly, *Eugene Walton*, 6 FCC Rcd at 6075, and *Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), among other cases, support its argument that the amendments "were not filed with due diligence, nor was the need for the amendments unforeseeable... They were rather the product of the applicants' voluntary inaction." Contingent Exceptions, pp. 14-15.

11. *Discussion:* Post-designation engineering amendments have been subject to a more stringent good cause showing by the Commission beginning in 1960 and continuing to the present. *See, e.g., Engineering Amendments*, 19 RR 1599, 1601-1602 (1960), and cases discussed by the Commission in *Imagists, supra*. It is axiomatic, as the Commission recently repeated in *Imagists*, at ¶ 8, that:

> To establish good cause for a post-designation amendment, "the applicant must demonstrate that it has acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process will not be disrupted, that there will be no prejudice to competing applicants, and that the applicant will not gain a comparative advantage." *California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 & n.28 (1982), citing *Erwin O Conner*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). Section 73.3522(b)(i) of the Rules provides that, in addition to the usual good cause requirements, the applicant must also show that engineering amendments are required by events that the applicant could not have reasonably foreseen.

12. At the outset, we note that our analysis is greatly facilitated by the Commission's decision in *Imagists*, which, among many other cases discusses *Eugene Walton*, and *Texas Communications*, on which Villamil had placed principal reliance here. In *Imagists* at ¶ 12, the Commission first explained that an applicant proposing a post-designation amendment must show that:

> it acted promptly after it discovered, or it should have discovered, the potentially disqualifying deficiency. Clearly, an applicant that sits idly by, either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence.

(Footnotes omitted).

13. Here, there can be no doubt that Villamil's petition to enlarge issues filed April 21, 1988 placed the applicants at the Buena Vista site on notice about "their potential disqualifying deficiency." In fact, when the applicants finally amended their applications more than two years later, the Mass Media Bureau recognized in its Consolidated Comments, filed May 14, 1990, at p. 2, that the amendments proposing a shorter and slimmer tower which would be concealed by trees relied on guidance provided by the April 1, 1988 letter of the Senior Planner of the Monterey County Planning Department which had been submitted as Exhibit 8 to Villamil's petition filed April 21, 1988.

14. The amendments in this case were filed in May, June and July of 1990, more than 24, 25 and 26 months after the applicants were put on notice about their local zoning problems, and given written guidance by a local official about how their problems could be resolved. The Commission has recently reiterated that due diligence will be carefully measured and that: "in the absence of unusual circumstances, a delay of more than six months has long been presumed to be excessive. Therefore, an applicant seeking to amend more than six months after the defect was, or should have been, discovered would have a heavy burden of establishing due diligence." (Footnote omitted). *Imagists*, at ¶ 14.

15. The principal explanation offered by the three applicants for their failure to promptly amend is that they did not need prior zoning approval before filing their applications. But, as we held in our *Remand Order*, the Commission's 1986 *Teton* decision, *supra*, established that they did need "reasonable assurance" that they could obtain such approval. *See* para. 6, *supra*. When Villamil showed that the proposed site use violated local land use ordinances and was strongly opposed locally, the applicants were on notice that they might not be reasonably assured of the site. Waiting to amend for two years after these problems were brought to their attention in a fully documented petition demonstrates an inexcusable lack of "due diligence." The *Walton* and *Texas Communications* cases establish that, after the petition to enlarge was filed, the need for the amendments was foreseeable and the belated amendments were the product of the three applicants' voluntary inaction. As in *Walton* and *Imagists*, where the applicants were denied leave to amend for

failing to establish good cause, we conclude that Artichoke, California Community, and Crystal's petitions for leave to amend should have been denied for their failures to show good cause. Accordingly, we grant Villamil's exception, reverse the ALJ's rulings, and reject the applicants' amendments filed on May 9, June 1, and July 15, 1990. *See* ¶ ¶ 7-8, *supra*.

16. Now that the amendments of Artichoke, California Community and Crystal have been denied, we must decide whether to remand this case for a second time to afford these applications another opportunity to establish that they had reasonable assurance of obtaining approval of their original Buena Vista site when they filed their applications in 1986. This was the very issue we specified in our 1990 *Remand Order* which the applicants attempted to meet, not by demonstrating reasonable assurance of obtaining approval from local authorities of the proposals they had when they originally applied, but by electing to amend their proposals to eliminate the local zoning objections. Thus, they have failed to resolve the substantial and material questions of fact and the issue specified in the *Remand Order*, *supra*, and are left with applications bearing a common disqualifying defect and subject to immediate dismissal. *See Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *aff'd mem. sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 945 (1985). These applicants find themselves in the same position as the applicant in *Imagists*, whose amendment was rejected by the Commission. Like the *Imagists* applicant, they lack a viable or unobjectionable transmitter site, and their applications must also be dismissed for the reasons fully articulated by the Commission in *Imagists*, at ¶ ¶ 10-11, and 17. *See also Walton*, *supra*, where an applicant which elected to pursue an unacceptable waiver request after designation for hearing could not later attempt to resolve the designated issue by amendment.

17. Our action on the amendments renders moot Villamil's argument that the amendments must be denied because the applicants should have taken steps to comply with the Commission's environmental and local zoning requirements in the first instance, *see* para. 9, *supra*. Our action also renders moot the questions of whether the ALJ erred in (a) denying Artichoke's application because it misreported the location and height of its amended site in obtaining local zoning clearance, SID, ¶ ¶ 5 and 13, and (b) denying the applications of Crystal and California Community for not satisfying their ultimate burden of proving that they had reasonable assurance that their amended proposals would receive local zoning approval. *Id.* at ¶ 12.

THE VILLAMIL SITE

18. Villamil was granted leave to amend its application to specify a new transmitter site by the ALJ who found that shortly after our remand Villamil learned of "a change of mind" by the original site owner. *See Memorandum Opinion and Order*, *supra*, FCC 90M-1436, at ¶ 10. This ruling has been challenged by two competing applicants on different grounds. The first is that the ALJ erred in not adding an issue to ascertain whether Villamil misrepresented the availability of its original transmitter site in 1986. Crystal's Exceptions, pp. 13-14. The second is that the ALJ should have denied the amendment and dismissed the application because Villamil acted more than 30 days after it learned that its original transmitter site was no longer available. California Community Exceptions, at pp. 12-13.

19. A party who, like Crystal, seeks a misrepresentation issue is required to support its petition with specific allegations of fact sufficient to support the action requested. Such allegations of fact must raise a *prima facie* question and, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof. *See* 47 CFR 1.229(d), and 47 USC 309(d). *See also Barry Skidelsky*, 7 FCC Rcd 1, 6 (Rev. Bd. 1992). A hearing issue will be added if "a substantial and material question of fact" is presented by the petition, the application, the pleadings filed, and other matters which can be officially noticed. 47 USC 309(d)(2). And the Court has held that:

> ... whether there exists, by reason of a valid petition or otherwise, "a substantial and material question of fact" requiring a hearing - the Commission may, and indeed must, weigh against the allegations of the petition the other evidence before it, including opposing affidavits filed pursuant to § 309(d)(1). On the basis of *all* those materials it must decide whether the ultimate question of fact placed in issue (in this case, the question of conscious misrepresentation ...) is a "substantial" one - *i.e.*, whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.

Citizens For Jazz on WRVR Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985) (emphasis in original).

20. At the outset of his analysis, FCC 90M-1843, at ¶ 3, the ALJ found that Crystal's allegations that Villamil misrepresented the availability of its transmitter site were not supported by affidavit of a person having personal knowledge of the facts as required by 47 CFR 1.229(d). Crystal does not challenge this ruling in its exceptions; rather, its argument on appeal is based on facts contained in Villamil's opposing affidavits. We turn to the ALJ's findings regarding those documents.

21. Villamil, in response to the misrepresentation allegations and in support of its petition for leave to amend, filed the Affidavit, and Statement, under penalty of perjury, of its principal Lawrence M. Wrathall. The Affidavit supports the ALJ's finding, *id.* at ¶ ¶ 5-6, that before Villamil filed its application on September 8, 1986, its principal responsible for obtaining reasonable assurance:

> spoke by telephone on September 3, 1986 with Mr. David Kelton of Bollenbacker & Kelton, Inc., the corporate site owner, about use of the proposed site. The conversation lasted about seven minutes, during which time Wrathall described the location that he was interested in and "discussed" with Kelton a lease term and monthly lease payment. Wrathall states that Kelton "agreed that the location I described to him could be considered as available for use as an FM antenna site...." Over a year later, on November 19, 1987, Wrathall again spoke on the telephone with Kelton about the site. After this conversation, Mr. Wrathall "continued to feel that I had reasonable assurance of antenna site availability at the site proposed."

> More than two years after that, on March 19, 1990, Mr. Wrathall learned indirectly from the site owner that "Nobody has permission to put FM antenna at Toro Park." On the following day, Wrathall again spoke to Kelton by telephone and Kelton stated to him that the matter of antenna site availability "was no longer in his hands, and that his older brother, Richard Kelton, President of Bollenbacher & Kelton, Inc. was very much opposed to any FM tower proposal on the subject land."

22. The Statement supports the ALJ's additional findings, *id.* ¶ 7, about what occurred in 1990. Wrathall contacted Richard Kelton by telephone March 22, 1990, regarding the proposed site, and that:

> Apparently, during this conversation, Kelton expressed some concerns about visibility and access to the site, and sometime thereafter, Wrathall responded to Kelton's concerns in writing. It also appears that on April 7, 1990, Wrathall wrote a letter to Kelton, enclosing a document of some sort which Wrathall evidently hoped would be executed by Kelton and would settle the matter of present site availability. According to Mr. Wrathall, Kelton responded with a letter of April 12, 1990 in which the following is stated:
>
> "I want to make my position absolutely clear that we have not made any decisions one way or the other on a final basis as to whether or not an FM tower would be permitted on the Toro Vista property, and if so on what terms and to what party. I am not prepared to execute the letter enclosed with your letter of April 7, 1990 as we have reached no decision on the availability of the site or its cost. I have advised you that we are in the beginning of a planning process and that we cannot permit the issue of an FM tower to jeopardize or delay our planning of a multi-housing development involving many millions of dollars."

23. As previously noted, Crystal did not contradict any of these facts with affidavits by persons having personal knowledge of the relevant facts. Now it argues in its Exceptions at pp. 13-14, first, that Wrathall was told on March 19, 1990 that: "Nobody has permission to put up FM antenna at Toro Park", and that: "The statement makes plain that Mr. Wrathall never had assurance of its site availability." Crystal Exceptions, p. 13. Second, that this fact is ratified by Richard Kelton's refusal to execute Villamil's April 7, 1990 letter. In essence, Crystal asked the ALJ to infer that Villamil made a "conscious misrepresentation" in its 1986 site certification from facts which occurred some four years later in 1990. After reviewing the circumstances both in 1986-1987 and 1990, the ALJ rejected Crystal's inference because: "What is clear in all this is that Villamil has lost reasonable assurance of its originally specified transmitter site." FCC 90M-1436, at ¶ 8.

24. In reviewing the ALJ's ruling, we are required by *Citizens for Jazz, supra,* to determine "whether the totality of the evidence" before him aroused "a sufficient doubt" about the candor of Villamil's 1986 site certification so that "further inquiry is called for." We agree with the ALJ that: "The circumstances [set forth in his order] suggest an initial meeting of the minds between Villamil and the landowner concerning the use of the site, and a subsequent change of mind by the landowner." FCC 90M-1436, at ¶ 9. We also affirm his rejection of Crystal's argument:

> The evidence indicates that Kelton originally gave Villamil permission to use the site in September 1986, and did so again in November 1987. The critical matter of the assurance given in September 1986 is not affected by the April 12, 1990 correspondence that Wrathall says that he received from Kelton. While Kelton then undertook to make it "absolutely clear" that Villamil could not rely on the proposed site, his stated reasons were that the corporation is "in the beginning of a planning process and that we cannot permit the issue of an FM tower to jeopardize or delay our planning of a multi-housing development involving many millions of dollars." The "beginning" of the corporate landowner's planning process with respect to the site in 1990 cannot logically relate back to September 1986 so as to constitute some evidence that the landowner did not extend "reasonable assurance" to Villamil at that earlier time. It is also not reasonable to believe that a supposed less-than-firm understanding between Villamil and the landowner in September 1986 would require restatement by the landowner almost four years later in the context of a "planning process" which was just then "beginning."

25. California Community's Exceptions, pp. 12-13, advance a different challenge to the ALJ's *Order* granting Villamil leave to amend. It argues that: "Villamil's loss of tower site is fatal to its application" because Villamil learned of the loss of its original site on March 19, but did not amend its application to report that fact until May 10, some 52 days later. According to California Community, it is hornbook law that, because Villamil failed to act "within 30 days to report the loss of its transmitter site, it was as a matter of law not thereafter entitled to amend" and its application must therefore be dismissed. It cites *National Communications Industries,* 6 FCC Rcd 1978, 1979 ¶ 4 (Rev. Bd. 1991), and *Eugene Walton, supra,* in support of its argument. *Id.*

26. Neither the cases which California Community cites, nor other Commission precedent, establish that an applicant's failure to amend or report a significant change within 30 days automatically forecloses that applicant from amending. Significantly, the Commission recently observed in *Imagists,* at ¶ 14, that: "An applicant waiting more than 30 days to file a petition for leave to amend should be prepared to explain the need for additional time, and it may be asked to document that, despite its failure to amend within 30 days, it took immediate steps upon learning of the deficiency." Thus, an applicant amending 30 days after a significant change is not automatically foreclosed from amending if it can nevertheless demonstrate that it acted with "due diligence".

27. Due diligence, the Commission recently indicated, requires an applicant to demonstrate that "it acted promptly after it discovered, or it should have discovered", a potential problem. Applicants may not "sit idly by, either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously" and later demonstrate due diligence. *Imagists,* at ¶ 12.

Here, Villamil's *Affidavit* and *Statement* established that on March 19, 1990 (some seven days after our remand), Wrathall, realizing that "David Kelton was going to be bombarded by telephone calls from other applicants seeking to relocate" to his site, "decided to personally update David Kelton as to what had transpired to date." *Wrathall Affidavit*, at p. 2. After several unsuccessful efforts to meet with David Kelton, Wrathall was given a note by Kelton's secretary which stated: "Nobody has permission to put up FM antenna at Toro Park". *Id.* The next day, March 20th, Wrathall was informed by David Kelton that the site question was "no longer in his hands" but those of his brother Richard Kelton, who was "very much opposed" to any FM tower on their land. Two days later, on March 22nd, Wrathall telephoned Richard Kelton, and attempted to satisfy the latter's concern about "visibility and access," and on April 7th, Wrathall wrote Richard Kelton asking for confirmation that the site was available. Finally, on April 12th, Wrathall received Richard Kelton's letter stating that the site was not available and on May 10th Villamil filed its new site amendment.

28. We hold, as did the ALJ, that Villamil has demonstrated due diligence, acting promptly after discovering that its original site was no longer available. *See Imagists, supra*. First, Villamil acted prudently and promptly in checking to be sure that its original site was still available after our remand. As soon as it became aware of the owners' change of mind, it tried to re-establish reasonable assurance by contacting the owners at least four times over an eighteen day period and attempting to satisfy the owners' concerns. When it became clear that there was no meeting of the minds, Villamil found another site and amended twenty-eight days later. We therefore affirm the ALJ's conclusion that the amendment was diligently filed soon after the discovery that "Villamil could no longer rely on the first site"; that it was "not voluntary in the sense that Villamil had reasonable choice"; and was not reasonably foreseeable since "a change of mind by the site owner was not something that Villamil could or should have been required to anticipate." FCC 90M-1463, ¶ 10. By way of contrast we note that Villamil's three competitors who had received notice in April of 1988 about their site problems did not file their amendments until more than two years later on May 9, June 1, and July 5, 1990. Thus, Villamil, the only remaining application, is basically qualified and is therefore entitled to a grant. SID, ¶ ¶ 12-13.

29. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed on May 9, 1990 by Crystal; on June 1, 1990 by Artichoke; and on July 16, 1990 by California Community, ARE DENIED; and

30. IT IS FURTHER ORDERED, That Artichoke's petition to reopen the record filed July 27, 1992 IS DENIED; that California Community's August 10, 1992 motions to strike Artichoke's petition to reopen the record, and supplemental Exceptions and Brief ARE DISMISSED as moot; that the request for additional oral argument IS DENIED; and that Villamil FM Radio's petition for leave to amend IS GRANTED and that its amendment IS ACCEPTED for reporting purposes pursuant to 47 CFR 1.65; and

31. IT IS FURTHER ORDERED, That the applications of Artichoke Broadcasting Corporation (File No. BPH-860917MG), Crystal Communications, Inc. (File No. BPH-860918NZ), and California Community Television Network (File No. BPH-860918OO), ARE hereby DISMISSED; and that the application of Julio A. Villamil, Maria Elena Villamil, Lawrence M. Wrathall and Nayereh E. Wrathall d/b/a Villamil FM Radio (File No. BPH-860918OL) for a new commercial FM station in Salinas, California, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

KEARSARGE TELEPHONE COMPANY — File No. W-P-C-6638

To construct and operate cable television facilities within its telephone service area, under the "rural area" exemption of Title VI of the Communications Act of 1934

ORDER

Adopted: July 1, 1993; Released: July 9, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In *Kearsarge Telephone Company*, 6 FCC Rcd 5036 (1991) (Order), the Common Carrier Bureau authorized Kearsarge Telephone Company ("Kearsarge") to construct and operate cable television facilities in the Town of Wilmot, New Hampshire. The Bureau found that Kearsarge's proposed cable service area, Wilmot, is a "rural area" containing fewer than 2500 people according to the Census Bureau of the U.S. Department of Commerce, and that, therefore, it was entitled, under 47 C.F.R. §63.58, to be exempted from the general prohibition against the provision of video programming by telephone common carriers in their service areas.

2. Cable One CATV, L.P. ("Cable One") filed[1] a petition for reconsideration, seeking reversal of the Bureau's decision, and Kearsarge filed a pleading in opposition.

II. CONTENTIONS

3. Cable One argues, first, that the Cable Act of 1984, at 47 C.F.R. § 533(b)(4), restricts joint cable-telephone common carrier undertakings to situations where cable demonstrably could not exist in the absence of such an undertaking, and that this is not the case in Wilmot, where Cable One stands ready to serve. Next, Cable One states that in applying the "rural area" exemption, the population of the Wilmot service area must be added to the population of the adjoining New London service area, and when this is done, the 2500 limit is exceeded. Finally, Cable One argues that the unique New Hampshire sparsely settled municipal boundary system makes it imperative that service area populations be aggregated, else the cross-ownership exemption would extend, by accretion, from municipality to municipality throughout the state.

4. Kearsarge replied that the relevant Cable Act provision is not 47 C.F.R. § 533(b)(4), but § 533(b)(3), which exempts a carrier from the cross-ownership ban "to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission)." In rural areas, says Kearsarge, Congress decided during the deliberations over the Cable Act of 1984 that the availability of alternate cable systems was no longer relevant. The population in issue, says Kearsarge, is the population of Wilmot, not the population of New London plus Wilmot, because only Wilmot constitutes the *proposed* service area.

III. DISCUSSION

5. In its original *Petition to Deny* Cable One argued that the service area in issue is the Town of Wilmot plus the Town of New London; that Kearsarge could not "bootstrap" from one approved rural exemption to an adjoining second rural exemption; and that since Kearsarge fails to justify an exemption, the application must be viewed as a waiver application, which should be denied because of the presence of Cable One as an alternate provider.

6. The Order responded to these arguments. Cable One merely restates these arguments in its petition for reconsideration. The issue of an alternate provider in the rural exemption was dispensed with by Congress in 1984. The "proposed service area" is the new area proposed to be served, here the Town of Wilmot, not the Town of Wilmot plus the Town of New London. Finally, as stated in the Order, "[t]he exemption contemplates that telephone companies will extend lines from current service areas to provide cable services into adjacent unserved areas." Order, at ¶ 6. Expansion of telephone company provided cable services from one rural area to another does not defeat the exemption. The intent of Congress in enacting the exemption was to stimulate the provision of cable to all rural areas. Order, at ¶ 5. Cable One has presented no arguments to justify disparate treatment of the rural areas of New Hampshire.

IV. CONCLUSION

7. Cable One's petition does not demonstrate that our earlier Order was in error.

8. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Cable One CATV, L.P. in the captioned matter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[1] The petition apparently was mailed to the Commission, but it was not addressed to the Commission's Secretary, as required by 47 C.F.R. § 1.106(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WASHINGTON D.C. SMSA LIMITED PARTNERSHIP — File No. 07812-CL-MP-92

PITTSBURGH SMSA LIMITED PARTNERSHIP — File No. 07811-CL-MP-92

ALLENTOWN SMSA LIMITED PARTNERSHIP — File No. 07814-CL-MP-92

For Modification of Licenses for Stations KNKA230, KNKA202, and KNKA290 in the Public Cellular Radio Telecommunications Service

ORDER ON RECONSIDERATION

Adopted: July 2, 1993; Released: July 9, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order, we address three petitions filed by Washington D.C. SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, and Allentown SMSA Limited Partnership (the Partnerships) that seek reconsideration of an earlier action by the Mobile Services Division (MSD) that returned the above-referenced applications as being unacceptable for filing because they failed to comply with the Commission's newly revised requirements for calculating service area boundaries.[1] For the reasons discussed below, we deny the Partnerships' petitions for reconsideration.

II. BACKGROUND

2. On April 9, 1992, the Commission released *Second Report and Order* in CC Docket No. 90-6 (*Second Report*), 7 FCC Rcd 2449 (1992), adopting rules governing certain applications for modification to cellular systems and the calculation of systems' Cellular Geographic Service Areas (CGSAs). The new rules took effect July 16, 1992, which became the deadline for certain licensees to file applications to expand the service boundaries of their cellular systems under the previous rules.

3. On July 15, 1992, the Partnerships tendered the subject applications to increase antenna power at an existing site of a cellular system serving the Washington, D.C., Metropolitan Statistical Area (MSA), and to increase antenna power and add new cell sites at cellular systems serving the Pittsburgh and Allentown, Pennsylvania, MSAs respectively. All three applications, however, did not include required FCC Forms 155, the Fee Filing Form, and they were, therefore, returned by the Commission's Fees Branch for this reason. The Partnerships resubmitted the applications with the Forms 155 on July 29, 1992, and requested that they be accepted *nunc pro tunc* as of their first filing on July 15, 1992. Their requests were denied. On August 27, 1992, the MSD returned the applications as being unacceptable because they did not comply with the new CGSA requirements that became effective on July 16, 1992.[2]

III. DISCUSSION

4. The Partnerships submit that the MSD's returning the applications was incorrect on two grounds. First, the MSD should not have found the applications unacceptable on the second filing date, because, but for the absence of the Forms 155, the applications were in full compliance with the technical requirements that were in effect when the applications were initially tendered. Consequently, conclude the Partnerships, the MSD's action puts form over substance. Second, the Partnerships say that the action disserves the public interest, since it prevents them from promptly expanding service to subscribers and roamers[3] in the Washington, D.C., Pittsburgh, and Allentown markets. The Partnerships claim that they cannot simply refile the applications now, but must wait for the rules revised in *Second Report* to take effect, which they say is months away. Consequently, the Partnerships argue that in the interim their subscribers will not be able to benefit from the modifications proposed in the rejected applications.

5. We have carefully reviewed all of the Partnerships' arguments and we are unpersuaded that the MSD erred in its refusal to accept the subject applications *nunc pro tunc*. The Partnerships seem to misunderstand the letter and spirit of the Commission's filing requirements. Sections 1.1107, 1.1108, and 1.1114 of the Commission's Rules prescribe procedures regarding statutory obligations that are required to be followed when submitting applications or other filings with the Commission. These rule sections specify that every application or filing must include a Form 155. *See* 47 C.F.R. § 1.1108(b). If a Form 155 does not accompany an application, the application will be dismissed and returned to the applicant without processing. *See* 47 C.F.R. § 1.1107(b). Dismissal is not necessarily fatal, however. An application that has been dismissed for failing to include a properly executed Form 155 may be corrected and resubmitted, but the date of the resubmission is considered the date of filing. *See* 47 C.F.R. § 1.1114(a)(2). The Rules do not provide that resubmission of a corrected application be afforded *nunc pro tunc* treatment, as requested by the Partnerships. Also, the Partnerships' attempt to trivialize the MSD's action as being based on form rather than substance is unavailing. Despite what the Partnerships choose to believe, the func-

[1] *See* Letters from Chief, MSD, to Linda K. Smith (Aug. 27, 1992).

[2] *See* n.1, *supra*.

[3] A roamer is a mobile station that communicates with a land station other than one which it is normally associated. *See* 47 C.F.R. § 22.2.

tion of the Form 155 is to assist the Commission in the orderly and efficient execution of its administrative obligations.[4]

6. Not only did the Partnerships impede this process with their failure to abide by a nominal requirement imposed upon all applicants, but they also have not proffered any reason or explanation for this failure. Accordingly, what we glean from the record before us is a lack of due diligence, which we cannot countenance.

7. Because the Partnerships' applications were resubmitted after the effective date of the new rules established by CC Docket 90-6, they were required to use the formula specified in Section 22.903(a) to calculate their service area boundaries. Moreover, the new rules also specify that a cellular system's CGSA is defined by the composite 32 dBu contours of its existing cells as calculated by the Section 22.903(a) formula. The MSD determined that the modifications proposed in the Partnerships' applications would cause their respective service area boundaries to extend beyond the new CGSA parameters. Therefore, the MSD's action returning the applications as being unacceptable for filing was entirely proper.

8. We also reject the Partnerships' assertion that the MSD's action disserves the public interest. Contrary to the Partnerships' assertions, the revised rules, specifying the new CGSA requirements, are in effect. On February 19, 1993, the Commission released an Order, which denied petitions for reconsideration of the *Second Report*.[5] Hence, the Partnerships' claim that they are now prevented from providing their subscribers the improved service that would flow from the modifications they previously sought because the rule changes contained in CC Docket 90-6 are not yet in place is moot.

IV. CONCLUSION

9. In light of the foregoing discussion, we find that the Partnerships have not demonstrated sufficient cause to warrant *nunc pro tunc* acceptance of their applications. We therefore affirm the MSD's action.

V. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by Washington D.C. SMSA Limited Partnership IS DENIED.

11. IT IS FURTHER ORDERED THAT the petition for reconsideration filed by Pittsburgh SMSA Limited Partnership IS DENIED.

12. IT IS FURTHER ORDERED THAT the petition for reconsideration filed by Allentown SMSA Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[4] *See, e.g., Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 5 FCC Rcd 3558, 3568 (1990).

[5] *Memorandum Opinion and Order on Reconsideration* in CC Docket No. 90-6, 8 FCC Rcd 1363 (1993), *further recon. pending; petition for review pending sub nom. Committee for Effective Cellular Rules v. FCC*, No. 93-1220 (D.C. Cir., filed Mar. 22, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-43

In re Applications of

OJEDA BROADCASTING, INC. File No. BPH-910705ML

For Construction Permit for
a New FM Station on Channel 243A
in Hobbs, New Mexico

Appearances

Nathaniel F. Emmons, Esq. and *Christopher A. Holt, Esq.* on behalf of Ojeda Broadcasting, Inc. and *Y. Paulette Laden, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: July 2, 1993; Released: July 9, 1993

1. Ojeda Broadcasting, Inc. (Ojeda) pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. §1.251, has moved for summary decision in its favor on the issues specified against it in the *Hearing Designation Order*, DA 93-215, released March 9, 1993 (*HDO*).

2. The *HDO* specified the following issues against Ojeda:

(1) To determine whether or not Ojeda was financially qualified at the time she filed her application.

(2) To determine, in light of the evidence adduced pursuant to issue 1 above, whether Ojeda misrepresented facts or lacked candor with the Commission in certifying its financial qualifications.

(3) To determine, in light of the evidence adduced pursuant to issues 1 and 2 above, whether Ojeda possesses the basic qualifications to be a licensee of the facilities sought herein.

Ojeda's was the only application for this facility designated for hearing.

FINDINGS

3. Ojeda is the sole applicant for a new FM facility in Hobbs, New Mexico. Originally, Ojeda's application was filed by Perla Acosta Ojeda as an individual applicant. However, Mrs. Ojeda subsequently amended her application as a matter of right on September 18, 1991, prior to the B cut-off deadline, to substitute Ojeda as the new corporate applicant. A copy of that tender amendment is attached to Motion herein as Exhibit 1. Perla Acosta Ojeda is the President, Treasurer and Director of Ojeda, and she owns 80% of the applicant's authorized stock. Hermilio Ojeda, Perla Acosta Ojeda's husband, owns 20% of the applicant's stock but is neither an officer nor a director of the corporation. The Ojedas are both of Hispanic origin and they have lived in Hobbs, New Mexico, the proposed station's community of license, for a combined total of over 55 years. See Affidavit of Perla Acosta Ojeda attached as Exhibit 2 (at ¶ 2). Moreover, they both are active and longstanding community leaders and they both have substantial broadcast experience in the proposed market. *Id.* at ¶ ¶ 2-3.

4. Attached to Ojeda's Motion, at Exhibit 3, is the affidavit of Ojeda principal Perla Acosta Ojeda. Therein, Mrs. Ojeda asserts that she and her husband had sufficient net liquid assets on hand to meet Ojeda's projected expenses. Bank records which have been provided support the assertion. Specifically, Mrs. Ojeda has shown that, when they caused the application to be filed, she and her husband anticipated costs of $50,000 to construct and operate the station for three months. They were counting on using a studio and equipment which they already employ to produce a radio program, as well as land which the Ojedas already own. In addition both Mr. and Mrs. Ojeda expected to work at the station. The Ojedas had $55,000 in cash at the time and all of their assets, including their home, were owned free of debt. Thus, it is clear that Ojeda was financially qualified at the time the application was filed, even if, as the *HDO* concluded, there was some question as to whether the bank letter Ojeda first obtained constituted reasonable assurance of financing from the bank. Because Ojeda's sole principals had the necessary funds in cash, bank financing was not needed at that time. In view of the foregoing, Ojeda has clearly established that Issue 1 should be resolved in its favor. *See Northampton Media Associates*, 4 FCC Rcd 5517 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd*, 941 F.2d 1214 (D.C. Cir. 1991).

5. Since Ojeda was financially qualified at the time it filed its application, it necessarily follows that Ojeda did not falsely certify as to those qualifications. In addition, even though the first letter obtained by the Ojedas, before they had the assistance of counsel, appears to fall short of the Commission's requirements for such letters, the fact remains that Mr. and Mrs. Ojeda believed that they had reasonable assurance of financing from the bank at that time. Thus, they had no deceptive intent when they certified that Ojeda had such reasonable assurance. Issue 2 will be decided in Ojeda's favor, as will be conclusory Issue 3.

6. The *HDO* did not specify a separate issue to specifically determine Ojeda's current financial qualifications, but it is noted that Ojeda's second bank letter, dated September 16, 1991, complies with Commission requirements. *See* Exhibit 2. Because the second letter is from the same bank, it also suggests that Ojeda may have had reasonable assurance at all times. In any event, Ojeda's Motion now appends the affidavit of D. Kirk Edens, the bank official with whom Mr. and Mrs. Ojeda met. Exhibit 5. Edens asserts that he was familiar with the Ojedas, who were regular bank customers. When Edens met with the Ojedas, he discussed with them their business plans, their broadcast experience, their financial resources, and possible financing terms. Thus, notwithstanding deficiencies in the original letter, now corrected in the new letter, the record indicates that Ojeda has reasonable assurance of

bank financing sufficient to construct the proposed station and operate it for three months without revenue. *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (Rev. Bd. 1990), *review denied* 6 FCC Rcd 1893, *recon. dismissed* 6 FCC Rcd 4626 (1991).

CONCLUSIONS

7. The Commission's Rules provide that summary decision may be granted where there exists no genuine issue of material fact that requires examination at hearing. 47 C.F.R. §1.251(a). The purpose of this rule is to avoid unnecessary hearings where material facts are not in dispute. *Summary Decision Procedures*, 34 FCC 2d 485, 487 (1972); *see, Telecorpus, Inc.*, 30 RR 2d 1641 (ALJ 1974). Where, as here, the party seeking summary decision establishes through sworn affidavits or other suitable materials that no triable issue exists, summary decision is appropriate. *See Ramon Rodriguez & Associates*, 66 RR 2d 1878, 1879 (Rev. Bd. 1989). The materials and sworn affidavits attached to this Motion as Exhibits 1-5 satisfy this requirement and conclusively establish that the specified issues should be resolved in Ojeda's favor.

8. Since the issues specified against Ojeda have been resolved in its favor, there is no impediment to the grant of Ojeda's application.

Accordingly, IT IS ORDERED that the Motion for Summary Decision, filed on June 8, 1993, by Ojeda Broadcasting, Inc. IS GRANTED, and the issues specified against Ojeda in the *HDO* ARE RESOLVED in its favor.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken to the Commission or the Commission reviews this Summary Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Ojeda Broadcasting, Inc. to construct and operate a new FM Station on Channel 243A in Hobbs, New Mexico IS GRANTED and this proceeding IS TERMINATED.[1]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 1, 1993

CAROLINA TELEPHONE AND TELEGRAPH CO. FILES PETITION FOR EXEMPTION FROM THE COMMISSION'S PHYSICAL COLLOCATION REQUIREMENT (CC DOCKET NO. 91-141)

PLEADING CYCLE ESTABLISHED

COMMENTS DUE: July 8, 1993
REPLIES DUE: July 12, 1992

On June 22, 1993, Carolina Telephone and Telegraph Co. (CT&T), a subsidiary of United Telephone Company (United), filed a petition for exemption from the Commission's requirement to file physical collocation tariffs at one central office located on the Fort Bragg military reservation in North Carolina. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*). United previously sought exemption for this office on the basis of a North Carolina Utilities Commission decision that purported to establish a policy permitting local exchange carriers in North Carolina to offer either physical or virtual collocation for intrastate special access services. The Common Carrier Bureau (Bureau) denied United's petition for North Carolina. *See* Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, DA 93-658, released June 9, 1993. CT&T now seeks exemption from the Commission's physical collocation requirement for its Fort Bragg central office, claiming that physical collocation would conflict with CT&T's leasing agreement with the United States Department of Defense.

Interested parties filing comments or oppositions to CT&T's petition are invited to do so no later than **July 8, 1993.** Parties filing replies may do so no later than **July 12, 1993.**

An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of CT&T's petition and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T	Transmittal Nos. 4974,
Communications	5149, and 5383
Tariff F.C.C. Nos. 2 and 14	

ORDER

Adopted: July 2, 1993; Released: July 2, 1993

By the Associate Bureau Chief, Common Carrier Bureau:

1. On March 30, 1993, AT&T Communications (AT&T) filed Transmittal No. 4974 to introduce a per call attempt charge[1] which will apply when AT&T provides its 800 service customers with a data base 800 vertical feature.[2] *Id.* at Proposed Sections 3.3.2.L. and 3.3.3., respectively. Also, the transmittal provides that AT&T will not offer vertical features to its 800 Plan P customers or its 800 Gold Service customers.[3] AT&T Tariff F.C.C. No. 2, Proposed Section 3.3.2.L. In addition, the transmittal, as revised pursuant to Transmittal No. 5383, provides that AT&T 800 Gold Service customers who currently subscribe to an AT&T term plan[4] may elect to discontinue AT&T 800 Gold Service "and move traffic to another AT&T 800 Services under their existing term plans for which vertical features may be utilized[,]" without incurring termination liability under the term plan. *Id.* at Revised Proposed Section 3.3.2.L at asterisk.[5] Further, the transmittal, as revised, provides that customers who purchased AT&T 800 Gold Service pursuant to a promotion under AT&T Tariff F.C.C. No. 2, Section 8 will not be liable for any penalties under that section when they move their AT&T 800 Gold Service traffic to another AT&T 800 Service. *Id.*

2. On April 14, 1993, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal No. 4974. On the same date, Sprint Communications Company L.P. (Sprint) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 4974. On April 23, 1993, AT&T filed a reply.

3. MCI and Sprint generally contend that AT&T's original proposed vertical features charge is excessive and anticompetitive in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. Section 201(b). MCI Petition at 1; Sprint Petition at 1-2, 3. Also, MCI and Sprint argue that because AT&T will not offer 800 data base vertical features to its 800 Plan P and 800 Gold Service customers, the original offering is unreasonably discriminatory in violation of Section 202(a) of the Act. MCI Petition at 6; Sprint Petition at 4.[6]

4. In its reply, AT&T claims that it established in its tariff support material that the proposed vertical features rate meets the net revenue test for new service tariff filings under Section 61.49(g) of the Rules. AT&T Reply at 3.[7]

5. The Common Carrier Bureau has reviewed Transmittal No. 4974, as modified, and all the associated pleadings. We conclude that no compelling argument has been presented that the tariff provisions, as revised, are so patently unlawful as to require rejection and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2 and 14, Transmittal No. 4974, filed by MCI Telecommunications Corporation, IS DENIED.

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[1] As initially filed, AT&T proposed a vertical features charge of $.005. AT&T Tariff F.C.C. Nos. 2 and 14, Proposed Sections 3.3.2.L. and 3.3.3., respectively. On June 30, 1993, pursuant to Special Permission No. 93-569, AT&T filed Transmittal No. 5383 to revise proposed Sections 3.3.2.L. and 3.3.3. to provide, *inter alia*, for a vertical features charge of $.0025. *Id.* at Revised Proposed Sections 3.3.2.L. and 3.3.3., respectively.

[2] *See generally* Provision of Access for 800 Service, Report and Order, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rule Making, 6 FCC Rcd 5421 (1991) *800 Reconsideration Order;* Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907; Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038; Order 8 FCC Rcd 1423 (1993). In general, vertical features allow a customer, for example, to divide 800 traffic between (or among) multiple interexchange carriers on the basis of such factors as time of day or place of origination of the call. *800 Reconsideration Order*, 6 FCC Rcd at 5422.

[3] AT&T 800 Plan P is designed for small volume users. AT&T 800 Gold Service is a high level 800 offering which provides enhanced service guarantees and improved performance.

[4] AT&T offers term plans to its 800 Gold Service customers. These term plans feature discounts from AT&T in return for term and revenue commitments from the 800 Gold Service customer. The term plans include termination liability provisions which, in general, calculate termination liability based upon a percentage of the remaining, unfulfilled commitment.

[5] The tariff, as revised pursuant to Transmittal No. 5383, also provides that when an AT&T 800 Gold Service customer makes such an election and fails to meet the annual revenue commitment under the customer's term plan, AT&T, prior to assessing a shortfall penalty, will recalculate the customer's 800 revenue based upon the usage rates for AT&T 800 Gold Service, rather than upon the usage rates for the AT&T 800 Service to which the customer moved its traffic. *Id.* Revised Proposed Section 3.3.2.L. at asterisk; *see also id.* ("Similar adjustments [and waivers of termination penalties] will be made for [c]ustomer[s] having [c]ontract [t]ariffs containing AT&T 800 Gold Service."); *see also id.* (to be eligible for the revenue commitment adjustment, customers must move the AT&T 800 Gold Service for which the adjustment is to be claimed within 60 days of the effective date of the tariff).

[6] In addition, Sprint contends that AT&T failed to define the term "vertical features" and, therefore, the tariff is unduly vague in violation of Section 61.54(j) of the Rules, 47 C.F.R. Section 61.54(j). Sprint Petition at 3. On May 14, 1993, pursuant to Special Permission No. 93-407, AT&T filed Transmittal No. 5149 to revise proposed Sections 3.3.2.L. and 3.3.3. to include a definition for the term "vertical features."

[7] *See supra* paragraph 1 for description of revisions made by AT&T to address the exclusion of its 800 Gold Service customers from the vertical features offering.

7. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2 and 14, Transmittal No. 4974, filed by Sprint Communications Company L.P., IS DENIED.

8. IT IS FURTHER ORDERED that the petition for waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, to advance the effective date of material filed within Transmittal Nos. 4974, 5149, and 5383 to July 6, 1993, on not less than one day's notice, as requested by AT&T Communications in Amended Application No. 1647, IS GRANTED. For this purpose, Special Permission No. 93-579 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Bureau Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-135

In the Matter of

Regulatory Reform for
Local Exchange Carriers
Subject to Rate of Return
Regulation

REPORT AND ORDER

Adopted: May 13, 1993; Released: June 11, 1993

By the Commission: Commissioner Duggan concurring and issuing a separate statement.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1-6
II. BACKGROUND	7-15
III. OPTIONAL INCENTIVE REGULATION PLAN	16-17
A. Tariff Filings: Frequency and Mid-Term Revisions	18-25
B. Earnings Band	26-31
C. Pricing Flexibility	32-39
D. Cost Basis for Incentive Plan Tariffs	
1. Basis of initial and subsequent filings	40-46
2. Adjustments to Historical Costs	47-56
3. Carrier Common Line Rates	57-60
E. Eligibility and Optional Basis	61-71
F. New Service	72-79
G. Infrastructure and Service Quality Reporting	80-84
H. Mergers and Acquisitions Under the Incentive Plan	85-88
IV. HISTORICAL COST TARIFFS FOR SMALL COMPANIES (SECTION 61.39)	89
A. Expansion to Common Line	90-96
V. BASELINE RATE OF RETURN REGULATION	97-98
A. Frequency of tariff filings	99-102
B. Historical Versus Prospective Costs	103-106
C. Treatment of new services and Pricing Flexibility	107-112
D. Incentive Regulation and Regulatory Reform within NECA	113-116
VI. IMPLEMENTATION SCHEDULE	117
VII. REGULATORY FLEXIBILITY ANALYSIS AND PAPERWORK REDUCTION	118-122
VIII. ORDERING CLAUSES	123
APPENDIX A -- List of parties	
APPENDIX B -- Rules	

I. INTRODUCTION

1. In this Order, we take significant steps to improve the way we regulate rates for approximately 1,300 small and mid-size local exchange carriers (LECs). This group of smaller carriers represent the approximately 6 percent of LECs whose rates are not regulated pursuant to price cap regulation, *i.e.*, that remain subject to traditional rate of return regulation. While these carriers vary widely in size, ownership patterns, and capital investment, in comparison to price cap LECs, they represent only 7.6 of the total access lines, 5.3 percent of the total access minutes, and 6.3 percent of the total industry revenue requirement.

2. These smaller carriers face increased challenges on a number of fronts. Neighboring Bell Operating Companies compete for customers with new services and repackaged existing services. Changing regulatory requirements, such as the Commission implementation of Open Network Architecture and requirements for expanded interconnection, create new expectations from customers and increase the demand for quality service and responsiveness. Finally, new technologies, in particular those offered by neighboring exchanges, increase the LECs' need for regulatory flexibility and the ability to respond to competitive service offerings.

3. In the wake of the Commission decision to adopt price cap regulation for the largest LECs, these small and mid-size carriers asked for regulatory methods more attuned to their diverse needs than the price cap system. This Order provides a package of three regulatory alternatives that small and mid-size companies can use to succeed in an evolving telecommunications marketplace, and that at the same time provide incentives to offer high quality service efficiently, and at reasonable cost to ratepayers.

4. In our small and mid-size LECs Notice of Proposed Rulemaking[1] we discussed the diversity of small and mid-size LECs and the challenges to designing improved regulatory mechanisms for these carriers. We tentatively concluded that the preferred approach to regulatory reform for this segment of the LEC industry is a continuum of increasingly incentive-based approaches which permits a company to select a plan best fitting its circumstances. At each point along this continuum, we proposed regulatory reforms to foster efficient investment decisions, and to provide companies with more flexibility to meet changing market conditions than they now have under existing rate of return regulation. At each step along the

[1] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, 7 FCC Rcd 5023 (1992)(hereinafter NPRM); 7 FCC Rcd 5501 (1992)(Erratum).

continuum of regulatory approaches, business risk would increase, as would the possibility for increased rewards in the form of potential earnings growth and reduced administrative burdens. In addition, under each approach ratepayers would be protected because efficiency gains would be passed along to ratepayers periodically in subsequent tariff review periods.

5. The record in this proceeding supports this approach. The rules we adopt here are largely as proposed in the NPRM with changes as supported by the record. These rules shall become effective 30 days after publication in the Federal Register.[2]

6. In this Order, we adopt new tariff rules to implement regulatory reform for small and mid-size LECs that remain subject to rate of return regulation. First, a new, optional, incentive-based plan is adopted which permits carriers to establish rates based on their historical costs. During the new two-year period before rates are revised, incentive plan carriers will be permitted to retain higher earnings than those that utilize prospective cost estimates in their ratemaking processes. The incentive plan also permits limited pricing flexibility and streamlined treatment for the introduction of new services in some situations. Second, we adopt rules that expand the scope of our existing small company rules by allowing LECs serving 50,000 or fewer access lines to file annual common line rates based on historical cost. Third, we amend our rules to permit carriers that do not elect to participate in the incentive plan or the small company rules to file tariffs every two years. Otherwise, we have left this baseline regulatory treatment of rate of return regulated carriers unchanged.

II. BACKGROUND

7. The *LEC Price Cap Order*[3] mandated that seven Regional Bell Operating Companies and the General Telephone Operating Companies file interstate access rates based on price cap regulation. All other carriers could choose to file rates based on price caps, but once they chose price cap regulation they could not return to rate of return regulation. Price cap regulation took effect for the largest LECs on January 1, 1991.[4] Six other large LECs have elected to become subject to price caps.[5] As a result, a substantial majority of interstate access customers are now served by companies regulated under a price cap regime.[6] With the largest LECs subject to price caps regulation, the remaining companies, subject to rate of return regulation, are fairly characterized as small and mid-size carriers.[7]

8. Of the LECs that remain subject to rate of return regulation, almost all participate in the traffic sensitive, carrier common line and end user common line pools administered by NECA. In a pooling environment, rates are based upon the total costs and total demand of all participating companies. Each company receives its actual costs, plus its share of the pool's earnings. The major reason companies want to participate in pools is to share risks, by providing a high degree of assurance that the company will recover its costs. The rates for these pools and other small and mid-size company tariffs under Section 61.38 of the Rules are based on projections of the LECs' costs and demand.[8]

9. Smaller LECs do not want to become subject to price cap regulation for numerous reasons. Many believe that they cannot abandon the risk sharing provided by the NECA pools and Long Term Support protection, which maintains a common line rate equivalent to a national average common line rate, without substantial risk to their continued financial viability. Others believe that, because of their small size, their business cycles are too long to comply with price cap's annual adjustments and that the financial effect of facility upgrades is too great to be reconciled with in the Commission's price cap framework.

10. The *LEC Price Cap Order* stated that the Commission would "initiate further proceedings dealing specifically with regulatory issues of concern to small and mid-size LECs."[9] The Order committed to examining regulatory options that "recognize the unique circumstances" facing smaller LECs.[10] Finally, the Order resolved to continue to examine small company issues "to ensure that desirable regulatory reforms are applied to small telephone companies as far as possible and applied with sensitivity to their special circumstances."[11] This docket is one of the vehicles that responds to the directives of the *LEC Price Cap Order*.[12]

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[2] *See* 5 U.S.C. § 553(b)(B).

[3] *See* Second Report and Order, 5 FCC Rcd 6786, 6827 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (Com. Car. Bur.) (*LEC Price Cap Order), modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed,* 6 FCC Rcd 7482 (1991), *upheld on appeal, National Rural Telecom Association v. FCC,* Nos. 91-1300, 91-1303, 91-1304 and 91-1326, slip op. (D.C. Cir. Mar. 26, 1993), *further modified on recon.* 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order), petitions for recon. of ONA Part 69 Order pending, appeal docketed, D.C. PSC v. FCC,* No. 91-1279 (D.C. Cir. June 14, 1991).

[4] *Id.*

[5] All LECs with more than 1 million access lines and fourteen of the sixteen LECs with more than 500,000 access lines are subject to price cap regulation, two of which elected price cap regulation this year.

[6] Companies under price caps regulation represent 92.4 percent of the total access lines. Approximately 94.7 percent of the access minutes are provided by price caps companies. Price caps companies generate 93.7 percent of the total LEC industry revenue requirement. (1990 NECA data filed with the Commission).

[7] Most small companies, those with fewer than 50,000 access lines who are also part of NECA Subset 3, are locally owned and operated LECs, organized as closely held corporations, cooperatives or mutuals. The "mid-size" companies, with between 50,000 and approximately 1 million access lines, generally have multiple telephone company subsidiaries. The stock of larger mid-size companies is often publicly traded. For the most part, these companies operate in more than one state.

[8] Of the 1308 local exchange study areas that are not subject to price cap regulation, 1184 are included in the NECA traffic sensitive pool; and 1253 are included in the NECA common line pool. Thirty-nine small companies maintain traffic sensitive tariffs under Section 61.39 rules, outside of the NECA pool. 650 study areas are served by average schedule companies. 243 of these companies are cooperatives. (National Exchange Carrier Association Description and Justification, Annual 1993 Access Tariff Filing, Transmittal No. 546, filed april 2, 1993, at 2 and 11).

[9] *LEC Price Cap Order,* 5 FCC Rcd 6786, 6827 (1990).

[10] *Id.*

[11] *Id.*

[12] *See also* Amendment of Part 65 and 69 of the Commission's

11. In the *LEC Price Cap Order*, the Commission adopted an annual productivity growth standard of at least 3.3 percent, after inflation, as the basis for setting maximum rates for all price cap LECs. In exchange, the plan grants those carriers the opportunity to earn significantly higher profits as an incentive for even greater productivity gains, as well as greater rate flexibility and lower regulatory requirements than under rate of return regulation. Price caps was made mandatory for the large LECs: the Bell Operating Companies and the General Telephone Operating Companies. Recognizing the varied conditions and characteristics of small and mid-size LECs, the Commission permitted those companies the option of remaining under rate of return regulation or enrolling voluntarily in price caps. We also indicated that we would explore ways to adapt the efficiency incentives of price caps to the needs of small and mid-size LECS.[13]

12. We presented an optional incentive regulation plan in the NPRM that initiated this docket. Essentially the incentive plan is a form of lagged rate of return regulation which allows LECs the opportunity to earn higher profits if they can improve efficiency above their historical performance during a two-year rate period. At the end of that period, rate levels are retargeted to the rate of return prescribed by the Commission. The plan sets no specific productivity target, as price caps does, but the carrier is rewarded if it can improve its productivity, because it is allowed to retain higher levels of profit than is allowed under rate of return regulation. Ratepayers benefit from the efficiency gains achieved by the carrier, because these are flowed through into lower rates in the next rate period by the retargeting.

13. As set out in the NPRM, the optional incentive plan offers small and mid-size LECs lower potential rewards than full price caps, commensurate with the lower risks incentive plan LECs would assume. For example, price cap LECs are permitted to earn up to 12.25 percent before sharing half of returns, and up to 16.25 percent before 100 percent sharing occurs.[14] The NPRM proposed the incentive plan LECs be permitted to earn up to 1 percent above the prescribed rate of return, which is currently 11.25 percent. By comparison, carriers subject to rate of return regulation are permitted to earn only 1/4 of one percent above the prescribed rate of return, on a total interstate basis. We also proposed giving incentive plan LECs greater flexibility in setting rates, based on service baskets and bands similar to those in price caps.

14. For LECs choosing to remain under baseline rate of return regulation, we proposed to reduce regulatory burdens by moving from annual to biennial tariff filing schedules and to simpler methods of projecting costs and demand. In addition, we proposed to expand the simplified filing options for small LECs contained in Section 61.39 of our Rules,[15] currently applied only to traffic sensitive rates, by adapting them to carrier common line rates as well.

15. Taken together, this range of regulatory approaches was intended to assure reasonable rates while reducing regulatory burdens and introducing or expanding incentives for efficiency and innovation. Overall, the record developed in this docket strongly supports all of these initiatives. In the remaining sections of this Order, we discuss the revision we are making to various details of the proposals set out in the NPRM as they were presented in comments or by our own ongoing review of our small and mid-size LEC regulations.

III. OPTIONAL INCENTIVE REGULATION PLAN

16. Our price cap system was designed for the largest carriers with the benefit of a long history of carrier-by-carrier oversight and experience. This detailed knowledge of each subject carrier's costs and pricing history enabled the design of an incentive program linked directly to each carrier's prices. Because the vast majority of smaller carriers have participated in the NECA pools, we do not have for them the same company-specific experience. Therefore, in designing an incentive-based regulatory system for the smaller carriers, we have designed a system linked to each company's historical costs rather than price. In a rate of return context, the incentives are established by reliance on historical costs and an extended tariff period. Such reliance is traditionally referred to as "regulatory lag." Because rates are reestablished every two years, this system encompasses less risk than price caps. Accordingly, we have designed a system with less potential reward than price caps.

17. The optional incentive plan we adopt today will be available to any non-price cap LEC for either its traffic sensitive rates only, or for both its traffic sensitive and common line rates. In comparison to current rate of return regulation methodology, the optional incentive plan incorporates longer tariff periods, greater reliance on historical costs, broader earnings bands and greater pricing flexibility. Every two years, rates are to be recalculated based upon costs and demand established during an historical period. During the two years, carriers operating pursuant to this plan would have the incentive to reduce their costs because cost increases will lessen their earnings while cost decreases will permit greater earnings.

A. Tariff Filings: Frequency and Mid-Term Revisions

18. *Notice*. The NPRM proposed that carriers participating in the optional incentive regulation plan file tariffs every two years. The NPRM tentatively concludes that two year filings would substantially reduce regulatory burdens, simplify the tariff review process, while permitting the Commission to scrutinize rates to meet our statutory obligations under the Communications Act to ensure rates are reasonable. More significantly, the NPRM tentatively found that an extended tariff period provides sufficient regulatory lag to create incentives for companies to

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Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, 7 FCC Rcd 4688 (1992) (exploring streamlining and improvement of the method by which an authorized rate of return is selected).

[13] *LEC Price Cap Order* at 6827.

[14] If the price cap regulated LEC accepts a higher productivity factor of 4.3, the carrier is permitted to earn up to 13.25 percent before sharing half of the returns, and up to 17.25 percent before 100 percent sharing occurs.

[15] 47 C.F.R. § 61.39.

manage their costs.[16] The NPRM asked whether companies electing to participate in the optional incentive plan should be permitted to file mid-term revisions. The NPRM proposed that carriers making such mid-term filings only if rates fall 100 basis points, or 1 percent, below the authorized rate of return, which is currently 11.25 percent. We also requested comments on permitting adjustments for cost changes that would render rates unreasonable, suggesting that incentive plan LECs might be required to bear a heavy burden of proving that cost changes had rendered their rates unreasonable.[17]

19. *Comments.* Several parties[18] generally agree with the tentative conclusion that the optional incentive plan reduces regulatory burdens for smaller LECs.[19] The ICC further asserts that increasing regulatory lag by one year provides additional incentives for innovation and efficiency.[20] No party opposed the two-year tariff period, or suggested a different period.

20. With regard to mid-term tariff revisions, the ICC argues that, since the regulatory lag is increased by one year under the proposal, it is appropriate to impose a higher burden of proof to justify mid-term changes. According to the ICC, the efficiency gains are maximized when prices are held constant.[21] USTA argues that, for mid-term filings within the two-year tariff period, the LEC should not be required to meet a heavy burden of proving that its existing rates are unreasonable. USTA asserts that imposing a high standard on mid-term filings would make the optional incentive plan more risky than price cap regulation, which provides for yearly automatic rate increases if carriers earn below 10.25 percent.[22] USTA suggests that we permit companies to use a rate adjustment factor to retarget their rates to allowed earnings limits within the two-year period.[23] ITAG contends that the burden of proof in a mid-term filing should recognize the difficulties small and mid-size carriers have in managing costs and reacting to demand changes.[24] Centel argues that limiting tariff revisions to a biennial filing may be unlawful under the Communications Act, which establishes a system of carrier-initiated rates.[25]

21. *Discussion.* We agree with the commenters that requiring tariff filings every two years under the incentive plan will substantially reduce regulatory burdens and will enhance the incentives carriers have to manage costs and stimulate demand to maintain or improve earnings.[26] Under current rate of return practice, all rate of return carriers file annual tariffs, updating their rates to be effective each July 1.[27] By requiring these filings only once every two years, the administrative burdens on the carriers will be substantially reduced.

22. A more significant issue is how difficult it should be for LECs to change rates in the middle of the two-year period. If carriers electing this plan are free to increase rates during the two-year period, their incentives to improve efficiency are severely reduced. Allowing carriers under the incentive plan to increase rates freely also undercuts the rationale for permitting LECS to retain higher earnings. The incentive plan is a voluntary plan under which the LEC accepts greater risks than under cost-plus, baseline rate of return regulation in order to be permitted to achieve greater rewards, but only if it improves its productivity.

23. Nevertheless, in unusual cases, unexpected events may cause unusually low returns that justify rate increases. To address those cases, we believe a mechanism similar to the lower formula adjustment in price caps should be applied. As adapted to the incentive plan, if after one year the LEC makes an adequate tariff showing that the optional plan limits have caused rates to fall below a zone of reasonableness, and this trend is likely to continue through the two-year rate period, we will permit the LEC to adjust rates upward. In order to preserve the plan's incentives, we will consider requests for upward mid-course rate revisions only if the LEC has fallen more than 0.75 percent below the prescribed rate of return and will permit rate increases only to the extent necessary to bring earnings to that same level during the second year of the rate period. Finally, we will continue to permit LECs subject to the incentive plan to request rate adjustments targeted to the authorized rate of return if the LEC can show that rates are otherwise confiscatory. We will expect the LEC to bear the burden of demonstrating that the optional incentive plan, including the lower rate adjustment, will not permit it to set reasonable rates. Any such filings will be subject to special scrutiny and a high probability of suspension and investigation. LECs will be required to submit detailed cost support, in accordance with the most recent Tariff Review Plan, to support any

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[16] NPRM, 7 FCC Rcd at 5025.

[17] *Id.* The NPRM reasoned that, if mid-term filings are permitted without also demanding that the carriers bear a heavier burden of proof than in routine tariff filings, the incentives for efficiency created by reliance on historical costs and a two-year regulatory lag are substantially reduced.

[18] The full names of commenting parties and abbreviations used in this Order are listed at Appendix A.

[19] ALLTEL Comments at 4; *see also,* Lincoln Telephone and Telegraph Company (Lincoln) Comments at 3, GVNW, Inc./Management (GVNW) Comments at 2.

[20] ICC Reply at 3; *accord* SBA Comments at 11.

[21] ICC Reply at 4; *accord* Taconic Comments at 7.

[22] USTA Comments at 21, citing *LEC Price Cap Order,* 5 FCC Rcd at 6802; *see also* Centel Comments at 4; PRTC Comments at 7-8; Lincoln Comments at 3-4 (arguing for 14 days' notice); JSI Comments at 3-4; SBA Comments at 12; ITAG Comments at 3-4.

[23] USTA Comments at note 50; *see also* Centel Comments at 3.

[24] ITAG Comments at 4-6 (arguing that costs associated with 800 database and SS7 demand levels, largely governed by interexchange carrier competition, and increased competition for exchange services contribute to the difficulty in predicting rates for a two-year period).

[25] Centel Comments at 3, citing *AT&T v. FCC,* 487 F.2d 865 (CA 2d 1973); *MCI v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985). Concluding that the effect of such rules would be to freeze rates, the court in *ATT v. FCC* held that this is the same as prescribing rates, which the Commission can do only after hearings have been held and the prescribed rates found to be just and reasonable. *AT&T v. MCI* at 874-875.

[26] *But see* MCI Reply at 6-8 (arguing that the Commission should undertake an in-depth analysis in an attempt to ascertain the small LECs' long term productivity and place certain categories of LECs in specific risk/reward incentive regulation plans). We affirm the conclusion of the NPRM not to take a price cap approach to introducing incentives to rate of return carriers.

[27] 47 C.F.R. § 69.3.

mid-term filing. They should also provide a detailed explanation of why existing rates, based on adjusted historical costs, are likely to be unreasonable.

24. We do not find this plan, as USTA argues, to be more onerous than price cap regulation. Unlike the price cap rules, incentive plan LECs are not required to lower rates relative to inflation by at least 3.3 percent annually. In addition, incentive plan LECs will have their rates aligned to revenue requirements every two years. Therefore, the incentive plan places far less risk on LECs than does the price cap system. Moreover, for those carriers that are unwilling to accept the more moderate risks established by the incentive plan, more traditional rate of return tariff filing requirements remain available to them.

25. Biennial filings will also permit us a better opportunity to review rates for reasonableness, in compliance with the Communications Act. As previously established in Section 61.39, two year filing periods are sufficient to ensure interstate rates remain reasonable. We find that biennial filings, punctuated by cost-based review of revenue requirements and rates, and supplemented by our authority to investigate rates on our own motion or pursuant to complaint, are a lawful exercise of our statutory discretion to tailor our regulatory systems. Since we are not precluding mid-term revisions, the optional incentive plan does not contradict the statutory system of carrier-initiated rates.

B. Earnings Band

26. *Notice.* The NPRM proposed to establish an earnings band for carriers that elect the optional incentive plan. This band is set to recognize that there is less risk associated with the incentive plan than is inherent in price caps, yet greater risk than involved in traditional rate of return regulation. Therefore the incentive plan should permit lower earnings than price caps, yet a broader band than is currently used for rate of return regulated carriers.[28] Specifically, the NPRM proposed a band that extends 100 basis points, or 1 percent, above and below the authorized rate of return, currently set at 11.25 percent. Unlike the price cap band, this band would adjust with any rate of return represcription.[29]

27. *Comments.* The ICC argues that a band of allowable earnings is preferable to a single-point rate of return because it creates incentives for the LEC to be more efficient and innovative in order to achieve greater earnings.[30] AT&T generally supports the proposed earnings band.[31] AT&T argues that the plan limits LEC risks because "access rates would be retargeted biennially to the LECs' authorized rate of return, mid-term adjustments to the lower earnings band would be permitted, and LECs would retain the option to revert to traditional rate of return regulation."[32] MCI asserts that no LEC has provided any showing that the level of risk inherent in the incentive plan justifies increasing the level of reward. Therefore, MCI contends, the Commission should not blindly expand earnings zones.[33]

28. USTA argues that the proposed upper limit on earnings for the incentive plan is far lower than that of price caps and fails to consider the inherent risk of the proposed incentive plan.[34] USTA states that, when the LEC retargets its rates to the authorized return level at the end of the two-year period, based on historical data, there is a significant chance that the LEC will not reach its authorized rate of return if its costs increase faster in the subsequent period than does demand. USTA also asserts that the likelihood of such a risk occurring increases as the LEC participates in the plan for multiple two-year periods.[35] Finally, USTA contends that the rewards of the plan are limited because all benefits of efficiency gains, other cost savings and demand stimulation, ultimately flow to the customer due to readjusting rates every two years.[36] Therefore, USTA proposes that carriers under the optional incentive regulation plan be permitted to earn "up to 200 basis points above the authorized level before being required to retarget to the authorized return at the end of each two-year period."[37] SBA suggests a reduction in the lower level to 50 basis points below the prescribed rate of return to give LECs greater assurance that their financial structure will be protected.[38]

29. USTA asserts that AT&T fails to recognize the substantial risks to LECs under the incentive plan. USTA asserts that the requirement that LECs retarget to the authorized return at the end of two years merely limits the carriers incentive potential because all the benefits of efficiency gains ultimately flow back to the access customer.[39] Further, USTA argues, the opportunity to make mid-term revisions will do little to limit a LEC's risks because such adjustments would increase rates only up to the lower earnings band and the LEC must meet a "heavy burden" to justify any rate increase at midterm.[40] Additionally, USTA continues, while a LEC will have the option to return to baseline regulation, this feature does not mitigate the risk that a LEC might not reach its authorized rate-of-return if its costs increase during the plan period faster than demand grows for its services.[41]

30. *Discussion.* In the NPRM, we tentatively concluded that an approach similar to the price cap earnings band was appropriate for the incentive plan. The price cap plan sought to balance risk with potential reward. We also concluded that, because the risks of the incentive plan are less than those associated with price caps, the rewards of the incentive plan should be less. This rationale is sound and is consistent with our design to establish a regulatory

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28 NPRM, 7 FCC Rcd at 5025.
29 *Id.* at ¶ 12.
30 ICC Reply at 4.
31 AT&T Comments at 3.
32 AT&T Comments at 4; *see also* SBA Comments at 15, stating that it "generally backs the encasement of incentive regulation within the integument of rate-of-return regulation for smaller LECs."
33 MCI Reply at 5.
34 USTA Comments at 11-12; *see also* ALLTEL Comments at 4-5; Lincoln Comments at 4-5; PRTC Comments at 6-7; Centel Comments at 4-5; GVNW Comments at 2.
35 USTA Comments at 12-13.
36 *Id.* at 13-14.
37 *Id.* at 16; *see* ALLTEL Comments at 5; JSI Comments at 5; ITAG Comments at 6; PRTC Reply at 3 (supporting USTA).
38 USTA Comments at 16.
39 USTA Reply at 8.
40 *Id.*
41 *Id.* at 8-9.

continuum which balances risk and reward. The level of permissible earnings represents a substantial part of the reward equation and deserves careful consideration.

31. We believe that the plan proposed in our NPRM represented a rational balance of risk and reward. This Order makes some adjustments to the plan proposed in the NPRM. As discussed below, we are somewhat strengthening the plan's reliance upon historical costs by disallowing "known and measurable" showings and, as discussed above, by imposing a burden of proof that rates are unreasonable for mid-term corrections. Therefore, it is reasonable to increase the earnings potential of the plan over the 100 basis points proposed in the NPRM, and to raise the lower bound of the band above the 100 basis points proposed. Price cap carriers are permitted to retain earnings of up to 200 basis points above the initially prescribed level without triggering the sharing mechanism. We believe that matching this level for the incentive plan would be unreasonable; however, we also believe that, in light of other changes made in this Order, 100 basis points may be too restrictive. We also recognize that, unlike for price cap carriers, changes in the prescribed rate of return would affect the earnings zone ceiling, and the lower end, for carriers participating in the optional incentive plan. Accordingly, to better balance the risks and rewards of the incentive plan, we increase the permissible earnings zone for incentive plan carriers from a 100 to a 150 basis point maximum for LECs that elect the plan for their traffic sensitive rates only. Because there is less earnings potential under the incentive plan than under price caps, it is reasonable that there be less of a down-side risk. Therefore, we also raise the lower end from 100 basis points below the authorized rate of return to 75 basis points below the authorized rate of return.[42] Finally, we believe this increase is warranted because, to the extent the carriers increase their earnings, the benefit of those earnings is passed to ratepayers in the next tariff filing.

C. Pricing Flexibility

32. *Notice.* Consistent with the proposal to give optional incentive plan carriers flexibility in pricing new service offerings, the NPRM also proposed some additional pricing flexibility for existing services. The NPRM proposed a basket and service category system defined on the same basis as in the price cap rules. Within each two-year period, aggregate rates for each basket would remain unchanged; however, carriers could adjust rates within each service category by 10 percent up or down over the two-year period, subject to the same reduced notice and support requirements as within-band price cap filings.[43] The NPRM asked whether the rules should establish some lower bound for pricing flexibility beyond 10 percent.[44]

33. *Comments.* The LECs commenting on the pricing flexibility support the NPRM proposal.[45] USTA argues, however, that the proposal should be clarified to state that, to the extent a LEC operating under this plan has "flexed" its rates, the existing rate relationships should be preserved at the next biennial filing. As under price caps, flexibility in rate setting should be cumulative, *i.e.*, include a mechanism to smooth the transition from rates "flexed" during the prior tariff period to new rates developed during the retargeting to the authorized rate of return for the next tariff period, according to USTA.[46]

34. MCI contends that it currently takes a price cap LEC a minimum of one year to change the overall rates of a service by 10 percent. Under the Commission's incentive plan proposal, MCI states, a participating LEC could make a 10 percent change in the price of a service all at once. Therefore, MCI urges limiting the incentive regulation LECs' pricing flexibility to 5 percent per year with a cumulative impact up to a maximum of 10 percent over the two year filing period.[47] MCI also opposes USTA's proposal to make the maximum amount of price changes cumulative, arguing that the small LECs are monopolists and have not shown that they face even the very limited competitive pressures that some large LECs face.[48]

35. *Discussion.* We adopt the proposal to create a limited system of pricing flexibility for carriers operating under the optional incentive plan. Drawing on our experience with price caps, flexibility shall be recognized in the form of a no-suspension zone, within which LECs remain relatively free to adjust prices. These filings would be permitted on 14 days' notice. Should rates move outside the zone, LECs must file the same cost support showings required of price cap carriers for above-band and below-band filings.[49]

36. The differences between price cap regulation and the optional incentive plan, however, require that we modify the no-suspension zone for use here. While we will adopt the same price cap baskets and service categories used in price cap regulation,[50] we will not mandate use of an index to track carrier prices.[51] Instead, aggregate

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[42] The NPRM asks whether it is appropriate to require sharing of earnings over the permissible levels for LECs participating in the optional incentive regulation plan. For the present we will not apply a sharing mechanism to the optional incentive plan. One of our goals in this proceeding is to maintain regulatory simplicity to the extent possible. While comments express some degree of interest in a sharing mechanism, there is no compelling argument made which demands that such a mechanism be a part of this regulatory plan. In general, issues pertaining to earnings in excess of the described band should be addressed in CC Docket No. 92-133 exploring streamlining and improving the method by which an authorized rate of return is selected and related enforcement issues.

[43] NPRM, 7 FCC Rcd at 5026.

[44] *Id.* at ¶ 19.

[45] ALLTEL Comments at 6; Centel Comments at 9; Lincoln Comments at 7; USTA Comments at 17.

[46] USTA Comments at 17.

[47] MCI Comments at 3-4.

[48] *Id.* at 9.

[49] *See* 47 C.F.R. § 61.49(c) and (d). Above-band filings must be accompanied by supporting materials establishing substantial cause for the proposed rates. Below-band filings must be accompanied by supporting materials establishing that the rates cover the service category's cost.

[50] 47 C.F.R. § 61.42(d)-(g).

[51] *See* 47 C.F.R. § 61.42(d) - (g). The LEC baskets include common line, traffic sensitive switched, and special access. An interexchange service basket would also be created if the LEC provides such services. The traffic sensitive basket includes the following service categories: 800 services; local switching; information; and transport. The special access basket includes: voice grade, WATS, metallic, and telegraph services; audio and video services; high capacity and DDS services; and wideband data and wideband analog services.

rates in a basket are based on aggregate revenues at the beginning of each tariff period. Aggregate prices in a service category, however, can decrease or increase by a maximum of 10 percent during the two years between rate filings.[52] The method of tracking prices will be determined in the tariff process.

37. This limited pricing flexibility responds to a variety of concerns that stimulated our re-evaluation of regulation of small and mid-size carrier pricing. First, since price cap LECs have similar rate flexibility, granting limited rate flexibility to carriers under the optional incentive plan helps ensure that small and mid-size companies can respond to pricing actions on the part of their price cap neighbors. Second, carriers regulated under this incentive plan absorb more risk than those regulated under more traditional rate of return. Our decision to employ historical costs, adjusted only by exogenous costs listed in the rules, as well as the creation of a two-year rate period, forces these carriers to manage their costs efficiently. That risk requires that we grant more freedom to manage their business operations. Without some pricing latitude, we will not succeed in creating a workable incentive-based system.

38. We do not believe there are significant advantages to MCI's proposal to limit flexibility to 5 percent per year, over our own proposal to allow 10 percent flexibility for the entire two-year period. MCI's proposal would add a layer of administrative complexity that would undercut some of the incentive plan's goals without apparent benefit. The concerns underlying MCI's proposal, moreover, can be addressed in the tariff review process. We decline to adopt this changes in the plan.

39. We also find that pricing flexibility should be cumulative, *i.e.*, that the rate relationships of "flexed" rates in effect at the end of a tariff period should be used to set rates at the beginning of the new tariff period. Absent this ability, carriers would not have the opportunity to address changing market conditions and moving to more efficient pricing.

D. Cost Support for Incentive Plan Tariffs

1. Basis of initial and subsequent filing

40. *Notice*. The NPRM proposes basing the first optional incentive plan filing on a cost of service study for the most recent 12 month period together with related demand data for the same period. Subsequent filings would be based on similar cost and demand information for all elements for the period since the time of the carrier's last filing.[53]

41. *Comments*. ALLTEL supports the proposal to base the first incentive plan tariff filing on the company's costs for the most recent 12 month period.[54] Lincoln proposes that rates in subsequent biennial filings should be adjusted using a cost and demand rate adjustment factor. This factor would prevent possible rate jumps between rates changed through pricing flexibility and those established at the beginning of subsequent tariff periods.[55] AT&T proposes that any LEC selecting the plan must file on the public record a tariff review plan which contains historical cost and demand data underlying proposed rate levels. AT&T notes that these data are routinely generated by the LECs and are essential to verifying the reasonableness of the proposed rates.[56]

42. Centel argues that we should not adopt the proposal to base costs on historical cost and demand. First, it asserts that such methodology is only appropriate for LECs "whose past resembles their future", not for companies like Centel that have operated efficiently in the past but face increasing costs in the future.[57] Centel also contends that the incentive plan's lack of an inflation adjustment requires LECs to absorb all inflation costs which results in a greater risk that a carrier will underearn.[58] Ronan urges that we permit carriers to use the average schedules prepared by NECA as a basis for rate development under the incentive plan.[59]

43. *Discussion*. We adopt the proposal in our NPRM to base the first incentive plan filings on cost of service studies and demand studies for the most recent 12-month period. Subsequent filings will also be based on the most recent 12-month period instead of on the period since the time of the carriers last filing. We believe that basing all filings on carriers' most recent 12-month period provides the most accurate data and provides consistency among data submission by LECs, facilitating analysis, review and monitoring. Reliance on historical costs serves two objectives: (1) historical costs reduce administrative burdens by creating cost showings grounded in historical, actual data that are straight forward to produce and explain; and (2) historical costs enhance the optional incentive plan's efficiency incentives by minimizing opportunities for padding costs by over estimating future expenditures or investments. Experience with the price cap plan and the Section 61.39 rules for small companies, both of which rely on historical costs, supports our conclusion here that historical cost showings are preferable to evaluating pro-

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[52] We borrow subindexes from price caps, as well as any category pricing limits differing from the plus or minus 5 percent rule.

[53] NPRM, 7 FCC Rcd at 5025.

[54] ALLTEL Comments at 5. *See also* Lincoln Comments at 5.

[55] Lincoln Comments at 5.

[56] AT&T Comments at n.5 (also arguing that tariff review plan material will be essential in establishing compliance with the optional incentive plan's provisions for pricing flexibility and new services). *But see* Lincoln Comments at 2-3 (arguing that it is no longer appropriate to define regulatory requirements based upon a Tier I and Tier II distinction, noting that the Tier I carriers still under rate of return regulation represent a small portion of the remaining 7 percent of total industry access lines. Therefore, Lincoln argues, the Commission should no longer apply filing and reporting requirements designed for the large carriers, now under price caps, to small and mid-size LECs (*i.e.*, ARMIS, TRP, etc.). Lincoln concludes that the distinction should be merely price cap and non-price cap.

[57] Centel Comments at 6.

[58] *Id.* at n.8; *accord* NARUC Comments at 4.

[59] Ronan Comments at 2-6. Ronan also asks the Commission to provide long term and transitional support payment to small independent LECS that exit the NECA pools and to exempt such carriers from the obligation to pay such support. Finally, Ronan ask that the Commission establish that average schedule companies that leave the NECA pools be permitted subsequently to return to the pools and retain their average schedule status.

spective, projected cost and demand data. For example, rates filed by carriers under Section 61.39 of our rules have been consistently lower than comparable rates filed by NECA.

44. With respect to AT&T's suggestion that we require a tariff review plan to be submitted with each biennial filing, we agree that tariff review plans associated with annual access filings have been a useful and informative means of standardizing the presentation of LEC cost support data. We have, however, considered and rejected codifying the tariff review plan (TRP). Detailed specification of a tariff review plan in Commission rules is unworkable, given the pace of regulatory, technological and competitive changes. The Common Carrier Bureau adjusts the review plan annually to accommodate new or modified requirements, such as the advent of price cap regulation, the implementation of the price cap sharing provisions, and the implementation of Open Network Architecture and database 800 services. While we expect that the Bureau will continue to rely on a standardized review plan, tailored to the various regulatory systems in use, and that the plan will be filed on the public record, we decline to establish formal rules governing the details of the review plan.

45. We also decline to adopt a productivity factor or an inflation factor. Because of the substantial diversity among smaller carriers, it is not possible to establish a workable productivity factor. In addition, providing for inflation alone does not yield a full accounting of external pressures. The incentives of this optional plan are based on regulatory lag and reliance upon historical costs. LECs choosing the plan assume the risks and reward of national and local economic factors on their operations during the two-year rate period. If carriers, such as Centel, believe that their business profile demands such factors, they may choose between our price cap system or rate of return regulation.

46. We decline to adopt the use of average schedule settlements as a surrogate for cost studies under the incentive plan as proposed by Ronan. Average schedule companies may participate in the NECA pools, or may file their own tariffs pursuant to Section 61.39 of our rules. In the latter case, the historical average schedule settlements formulae serve as a surrogate for cost studies. We believe that these options are reasonable and sufficient to meet the needs of average schedule companies, without requiring a conversion to cost. Additionally, as with price caps, the pricing flexibility mechanism and the necessary regulatory oversight of company earnings require actual costs to develop rates.[60]

2. Adjustments to Historical Costs

47. *Notice.* The NPRM proposed two mechanisms for adjusting historical costs at the time of the biennial filing. Carriers could recognize "known and measurable" costs if the exclusion of such costs would cause the carrier to earn less than 100 basis points below the authorized rate of return. With such a showing, the carrier would retarget rates to earn 100 basis points below the authorized rate of return. Such showing would be subject to a higher burden of proof than would a purely historical cost showing. The NPRM asked for types of costs which would be included as "known and measurable."[61] The NPRM also proposed to permit carriers to recognize costs classified as "exogenous costs" within the meaning of that term in the price cap plan. A carrier could choose to claim exogenous costs either at the time of a biennial filing or at the time the cost occurred during the two-year rate period.[62]

48. *Comments.* While the proposal to recognize exogenous cost changes drew little comment,[63] the proposal to recognize other "known and measurable costs" created strong differences of opinion. AT&T argues that, if "known and measurable" costs are included initially in a carrier's rates, the carrier's incentive to reduce costs through actual efficiencies is substantially diminished.[64] AT&T further contends that the inclusion of "known and measurable" costs would complicate the implementation of tariffs by permitting the use of a mixture of historical and prospective costs, rather than historical costs alone.[65] To guard against overforecasting of "known and measurable" changes, AT&T argues, there would need to be some form of post-period audit to determine whether these changes actually occurred, at what magnitude they occurred, and whether access customers are entitled to refunds of excessive rates that were predicated on unrealized costs.[66]

49. AT&T argues that in no event should LECs obtain the benefits of rate-of-return regulation through guaranteed recovery of their normal business expenses while at the same time enjoying the generous pricing and earnings flexibility of the optional incentive plan.[67] Other parties contend that "known and measurable" costs are unnecessary in light of the proposal to permit mid-term rate corrections which protect LECs from inadequate earnings while at the same time preserving the LECs' incentives to become more efficient.[68] According to ICC, the mid-term revision is the appropriate forum in which the LEC should argue for recovery of such costs. AT&T argues that the definitions of "known and measurable" offered by the LECs would effectively allow the inclusion of virtually all of the ordinary costs of doing business.[69]

50. USTA argues that under its proposed definition of "known and measurable" changes, only instances where there is an objective confirmation of the future event causing a cost or demand change would qualify as "known and measurable."[70] Accordingly, USTA contends,

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[60] We also find Ronan's request to extend the benefits of Long Term Support to small companies exiting the NECA pools to be beyond the scope of this proceeding.

[61] NPRM, 7 FCC Rcd at 5026.

[62] *Id.*

[63] GVNW Comments at 3; ALLTEL Comments at 5 (arguing that exogenous costs be reflected prospectively).

[64] AT&T Comments at 4. *See also* ICC Reply at 5.

[65] AT&T Comments at 4-5.

[66] *Id.* at 5. *See also* ICC Reply at 5.

[67] AT&T Reply at 4.

[68] *Id.* at 5-6. *See also* MCI Reply at 7 (supporting AT&T position); ICC Reply at 5.

[69] AT&T Reply at 3.

[70] USTA Comments at 14; *accord* Centel Comments at 7; JSI Comments at 5-6; GVNW Comments at 3; Lincoln Comments at

in view of the high confidence level required of changes considered to be "known and measurable," AT&T's concern that the costs "may not actually materialize during the two-year tariff period" is unfounded.[71] USTA also argues that we should establish a threshold requirement for recognizing "known and measurable" costs: such costs would be included only if, without them, rates would produce earnings at least 100 basis points below the authorized rate-of-return. USTA argues that this threshold should exclude all but the largest "known and measurable" changes from consideration.[72] Finally, USTA argues, the ability to make mid-term rate adjustments does not obviate the need for "known and measurable" changes, particularly under the Commission's proposal which would require a LEC to meet a heavy burden of proving that its current rates are unreasonable. Further, USTA states, mid-course adjustments would be prospective only, and would prevent LECs from recovering known and measurable changes that occur prior to the mid-course correction.[73]

51. *Discussion.* We continue to believe that exogenous costs, those listed for price caps in Section 61.45(d) of the Commission's Rules, should be used to adjust the historical costs used in the optional incentive plan. These are basically cost changes associated with Commission programs and rules, or other events outside the control of the LECs. As in the case of price cap LECs, adjustment for these changes should more accurately track costs, without distorting the LEC's incentives to become more efficient in areas that are within its control. Adopting the price cap list of exogenous factors should also be administratively feasible.

52. Upon reflection, however, we believe the arguments raised against adjustments to historical costs for "known and measurable" future events are persuasive. As AT&T points out, review of both the initial amounts of costs assumed to be "known and measurable" and, subsequently, of whether those amounts proved to be accurate, would be necessary but administratively difficult and intrusive. An important advantage of historical costs is to reduce the burdens of reviewing. Adding consideration of claimed "known and measurable" costs would largely forfeit this advantage.

53. Adjustments for "known and measurable" costs are also likely to be unduly favorable to LECs, in at least two ways. First, the potential cost changes that might qualify as "known and measurable" would be best known, and perhaps only known, to the LECs themselves. The LEC would have a substantial incentive in this situation to report only the potential cost increases, not reductions, or to target increases to shortly before the beginning of the rate period, while leaving offsetting savings until after the period had begun. Second, focusing only on cost changes ignores the equally important question of benefits. Introduction of a new capability such as SS7 may increase some costs (such as switching costs) but may well reduce others (such as transmission costs) while allowing the LEC to offer new services and options. Adjusting rules solely for the higher costs without recognizing the offsetting savings and other benefits, would be unduly generous to LECs and unfair to ratepayers.

54. Therefore, we believe AT&T is fundamentally correct, that including "known and measurable" prospective costs would undermine the plan's efficiency incentives. As in the case of price caps, the incentive plan places greater responsibility for operational decisions on the LEC than cost-plus rate of return regulation, while providing incentives in the form of higher profits for good decisions, and disincentives in the form of lower profits for bad decisions. Granting automatic rate adjustments for "known and measurable" changes would substantially eliminate such incentives. We accordingly conclude that the optional incentive plan should not permit adjustments to historical costs for "known and measurable" costs.

55. In the context of this optional incentive plan, we find that a system which recognizes exogenous cost changes, as defined in the price cap rules,[74] and that permits mid-term filings to correct rates that are unreasonable, strikes the best balance between our efficiency objectives and our statutory obligations to ensure reasonable rates. As in our price cap system, carriers operating under the incentive plan can claim exogenous costs either in the biennial filing or as exogenous costs occur during the two-year rate period.[75] Thus, for the limited class of costs that are defined as exogenous by our rules, LECs operating under the optional incentive plan can recover these costs when they are incurred, and need not wait for the biennial filing. Moreover, unlike the price cap system, which would ordinarily deny rate increases that are above the price cap or pricing band unless based on costs found to be exogenous, the optional incentive system merely delays recognition of such endogenous costs to the biennial cost review.

56. Mid-term tariff revisions provide further assurance that rates are producing reasonable results. While we have necessarily established a higher burden for mid-term filings, the existence of mid-term filings ensures that, for the majority of costs not recognized as exogenous, a sudden increase in costs relative to historical levels can be given early recognition in rates.

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4. For example, if a LEC wanted to (or had to) include SS7 implementation costs in its base period data, the LEC would need a signed contract or other firm documentation evidencing the planned installation of SS7 capability along with the precise costs involved, as well as other applicable showings. Such costs would not qualify for known and measurable treatment merely because the LEC had included the costs in its next year's budget. USTA Reply at 16.

71 USTA Comments at 16-17.

72 *Id.* at 17.

73 *Id.* at 17-18. *See also* PTI Reply at 4-6.

74 47 C.F.R. § 61.45(d). Changes recognized as exogenous under Section 61.45(d) are limited to those cost changes caused by: the completion of the amortization of depreciation reserve deficiencies; changes in the Uniform System of Accounts permitted or required by the Commission; changes in the Separations Manual; changes to the level of Long Term Support or Transitional Support obligations described in § 69.612; the reallocation of investment from regulated to nonregulated activities pursuant to § 64.901; inside wire amortization; and, such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require.

75 As in the price cap system, exogenous cost showings can not be contingent upon a future event -- *e.g.*, the prospect that some cost might materialize due to future Commission action is not sufficient.

3. Carrier Common Line Rates

57. *Notice.* The NPRM stated that common line rates present a more complicated problem than other rates, because the recovery of common line costs is split between carrier common line rates, which are charged on a per minute basis to interexchange carriers, and subscriber line charge rates, which are charged on a per line basis to subscribers. A further complicating factor is that the amount of the per minute carrier common line charges changes with demand, since common line costs are essentially fixed.[76] We proposed that rates for optional incentive plan LECs be derived using costs from the most recent 12-month period.[77] To derive demand, the company would determine the average carrier common line usage and the percentage growth in usage over the most recent 24-month period. Demand for the rate period would be determined by a simple extrapolation of base period demand increased by base period percent growth.[78] The proposed methodology is consistent with current rate of return practice in which the benefits of demand growth are immediately flowed through to ratepayers. It differs in that rate of return practice permits the use of prospective data, while the proposal for the optional incentive plan relies solely on historical cost and demand. Thus, the LEC has incentives to reduce its costs and stimulate demand growth.

58. *Comments.* AT&T argues that the proposed method correctly captures prospective demand growth by tying it to actual, historical growth rates rather than speculative projections as to how demand will grow in the future. AT&T also states the proposal will be simple to administer.[79]

59 . USTA argues that the application of the proposed formula would result in ascribing the full benefit of growth in common line demand to the LECs' interexchange carrier customers and none to the LECs themselves, which is contrary to the Commission's decision in the price cap proceeding to credit LECs with at least 50 percent of the benefit of demand growth. USTA contends that, at the very least, the adjustment made in the formula to account for common line demand growth under optional incentive regulation should provide LECs with no less incentive to increase carrier common line productivity than afforded by the price cap plan. USTA proposed an alternative formula that it alleges would provide strong incentives for LECs to encourage the growth of common line demand.[80]

60. *Discussion.* We agree that the formula for common line demand adjustment proposed in the NPRM would deny LECs any credit for growth in interstate common line demand. On the other hand, we find that the formula proposed by USTA would be overly generous. As we did with the price cap plan, we find that permitting LECs to share in the benefits of demand growth creates a significant incentive for greater efficiency. We therefore adopt the common line formula that uses the historical growth in common line minutes of use, divided by two to compute carrier common line rates. This approach represents a middle ground between the method applied currently to rate of return LECs and the method applied to price cap LECS. This approach shares the price cap concept of crediting the LEC with 50 percent of the benefit of demand growth; however, it is not based on minutes per line, but is based on minutes alone, similar to the method currently used for rate of return carriers.

E. Eligibility and Optional Basis

61. *Notice.* The NPRM proposed that the incentive plan would be available to any non-price cap LEC that has exited the NECA pools. The plan would not be available to any company that participates in a multi-company tariff.[81] In addition, the NPRM concluded that any small and mid-size company incentive plan should be optional. However, carriers electing to file pursuant to the plan would have to participate for all their interstate rates.[82] The proposed rules would require average schedule companies to perform cost studies in support of rates filed pursuant to the incentive plan. Carriers electing the plan must remain under the plan for at least two years. If a carrier leaves the plan, it would maintain a company-specific tariff under Section 61.38 until the fourth year after the year in which it ceased its participation in the incentive plan.

62. *Comments.* The proposal that the incentive plan be available on an optional basis is supported by most commenting parties specifically and opposed by none.[83] Other parts of the proposal were more controversial.

63. USTA asserts that a LEC should be permitted to elect the optional incentive regulation plan for traffic sensitive rates while remaining a participant in the NECA common line pool.[84] USTA further states that only five non-price cap LECs do not participate in either NECA pool, while approximately 50 LECs participate in only NECA's common line pool.[85] USTA and AT&T argue that the primary goal of the plan should be to provide benefits of incentive regulation to the largest number of LECs possible, regardless of whether those LECs eventually move to price caps.[86] USTA further argues that a LEC's decision to continue in the NECA common line pool would largely be based on reasons p unrelated to the incentive plan and that other safeguards proposed would effectively preclude gaming or other abuse.[87]

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[76] NPRM, 7 FCC Rcd at 5028.

[77] In the case of Section 61.39 carriers that are average schedule companies, the use of the LEC's most recent common line settlements through the average schedules was proposed.

[78] NPRM (Erratum), 7 FCC Rcd 5501.

[79] AT&T Comments at 8-9.

[80] USTA Comments at 29; USTA Reply at 11-23, citing *LEC Price Cap Order*, 5 FCC Rcd 6786, 6794 (1990). *But see* AT&T Reply at 5 (USTA plan substantially reduces incentives to reduce costs and fails to give ratepayers the benefit of lower rates).

[81] NPRM, 7 FCC Rcd at 5027.

[82] *Id.* at 5027.

[83] Lincoln Comments at 8; PRTC Comments at 5-6; ITAG Comments at 2; GVNW Comments at 4; SBA Comments at 8-9; NTCA Comments at 5-7; OPASTCO Comments at 8.

[84] USTA Comments at 5; *see also* Alltel Comments at 7-8; PRTC Comments at 2-4; PTI Comments at 3-4; JSI comments at 9; ITAG Comments at 7; GVNW Comments at 8; SBA Comments at 10; USTA Reply at 4-6.

[85] USTA Comments at 6-7.

[86] *Id.* at 8. AT&T Reply at 5-7; *see also* PRTC Reply at 2.

[87] USTA Comments at 10 (noting that the Section 61.39 small company rules apply only to traffic sensitive rates).

64. MCI opposes bifurcation of the optional plan, citing the Commission's tentative conclusion that in order to maximize the benefits of an incentive plan, the company's total regulated interstate operations should be subject to the plan.[88] MCI contends that none of the comments favoring this form of optionality have adequately explained their positions. MCI argues that the LECs would have a financial incentive to report investments, expenses, reserves and revenues in a manner which would generate a traffic sensitive rate of return as high as possible. MCI states that if common line earnings suffer, the pooling process would "correct" these mythical earning deficiencies in the following year. MCI argues that this is merely an opportunity for LECs to increase total earnings without increasing efficiency.[89]

65. With respect to the provision allowing LECs to opt out of the incentive plan, USTA, and many of the commenting LECs, support the Commission's proposal that LECs be permitted to leave optional incentive regulation subject to appropriate safeguards, and that the proposed minimum two years in and four year out, will help ensure that LECs do not game the process by switching back-and-forth between the filing options.[90] USTA does request clarification that the proposal that a LEC must file "company-specific" rates when it leaves the incentive plan is not intended to deprive a group of affiliated telephone companies from filing a single tariff that is not an association tariff, as is now permitted under the Commission's rules.[91] USTA also argues that, to be consistent with current rules, a carrier leaving incentive regulation should be permitted to reenter, or enter for the first time, NECA's traffic sensitive pool. USTA argues that a requirement that the LEC cannot participate in the common line pool would be particularly severe in light of the proposal that the carrier cannot return to the incentive plan for four years.[92] USTA also argues that small LECs (carriers with less than 50,000 access lines) should be permitted to reenter both the common line and the traffic sensitive pool in order to ameliorate part of the risk faced by these companies due to their higher revenue variability.[93] ITAG states that companies should not be required to file tariffs | under the more burdensome Section 61.38 if they drop out of the optional incentive regulation plan, but should be permitted to file a Section 61.39 tariff or return to the NECA pools.[94]

66. The ICC asserts that carriers that elect to participate in the optional incentive plan should commit to participate for longer than two years. While the ICC agrees that this plan should be optional for non-price cap LECs, the ICC notes that it is unlikely that much will be learned about whether a LEC choosing this plan has increased efficiencies or made other gains in service quality in just two years.[95]

67. *Discussion.* We will permit carriers to elect to employ the incentive plan to set rates for either their total interstate operations, or for their traffic sensitive rates only, while participating in the NECA pools for other rates. This additional flexibility is consistent with our attempt to maintain the balance of risk and reward we seek to maintain in this proceeding. Moreover, given that this plan is grounded in rate of return methods, we are not as concerned as we were in the price cap proceeding that applying different methods to different rates would permit LECs to game the system. Attempts to cost-shift would be detectable in two ways -- through the biennial tariff review process, which requires a showing of cost by basket, and, for a few of the carriers likely to elect the plan, through ARMIS, and the Commission staff's performing trend analysis and comparing reports from several carriers to divulge anomalies.[96] NECA will also monitor claims for costs within the pools, as it does now for LECs. These protections offer reassurance that LECs will not be able to use these diverse regulatory methods to produce unreasonable rates. Furthermore, we are persuaded by the arguments of USTA and those carriers most likely to elect this plan, that this form of optionality will greatly encourage participation. Because we believe the optional incentive plan constitutes improved rate of return regulation that will yield dividends to ratepayers, encouraging maximum participation is important.

68. While we agree that a carrier that fully participates in the plan experiences the strongest incentives for efficiency, even partial participation is better than none. A company may rationally elect the plan for traffic sensitive rates initially, gain confidence in the new regulatory system, and later move its common line rates into the plan. Such action would be consistent with our broader scheme of giving smaller carriers a continuum of choices of regulatory alternatives. With regard to the carrier's incentive to manipulate its books of account, the biennial tariff review, ARMIS, NECA pool monitoring, and the complaint process provide sufficient opportunity for MCI or others to challenge the carriers accounting methods and to seek remedies for improper cost shifting.

69. All commenting parties support the proposed optional nature of the plan. The optional character of our proposal is consistent with our recognition of the inherent diversity of the smaller companies. This optional feature also establishes the proper balance between meeting our regulatory responsibilities and a company's legitimate business needs. We therefore restate our commitment to maintaining the optionality of our regulatory alternatives for smaller carriers.

70. In the NPRM we proposed that carriers electing the plan be required to remain in the plan for only one two-year tariff period before they may exit the plan. We believe that requiring participation for a longer period, combined with adequate notice of the carriers intent to leave the plan will provide stronger protection against abuse. Therefore, we will establish four years, or two tariff periods, as the minimum for participation in the incen-

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[88] MCI Reply at 3.
[89] *Id.* at 3-4.
[90] *E.g.*, USTA Comments at 24-25. *See also* Lincoln Comments at 8; *but see* Centel Comments at 10 (arguing that LECs should be eligible to return after two years).
[91] USTA Comments at 25.
[92] *Id.* at 25-26. *See also* PRTC Comments at 4-5.
[93] USTA Comments at 26.
[94] ITAG Comments at 8. *See also* GVNW Comments at 4.
[95] ICC Reply at 7.
[96] The Commission's Automated Reporting Management Information System (ARMIS) is a database comprised of detailed cost and accounting information submitted by the larger LECS.

tive plan. In addition, carriers seeking to exit the incentive plan must provide notice to the Commission, two years before exiting the plan.

71. We next address the rules governing a carrier's election to abandon the incentive plan. The proposed restrictions are intended to assure that the plan creates long term incentives for efficiency, not opportunities for short term profits through switching between different regulatory plans. We proposed to deter the latter by limiting the carrier's choices if it wishes to leave the incentive plan. Although the election is not permanent, a carrier leaving the plan may not return to the NECA pools and must maintain its own tariffs under Section 61.38 of our rules, or become subject to price cap regulation. ITAG and GVNW argue that companies serving 50,000 lines or fewer should be permitted to leave the incentive plan and file tariffs pursuant to Section 61.39. We do not find the arguments compelling and remain concerned that the choice might be abused; however, we would consider requests for waiver to permit small companies leaving the incentive plan to follow Section 61.39 upon a showing of good cause, that no windfalls or other abuses would occur.[97]

F. New Services

72. *Notice*. The NPRM sought to streamline the introduction of new services which help the small or mid-size LEC compete with a nearby price cap LEC for customers. Under the proposed rules new services would receive streamlined tariff treatment, including a presumption of lawfulness, if the anticipated earnings are *de minimis* and the rates do not exceed the rate charged by the geographically closest price cap regulated LEC offering comparable service. The NPRM proposed that *de minimis* would be defined as 2 percent or less of the company's total operating revenue. According to the NPRM, if these parameters are not met, the carrier would be required to file section 61.38 cost support material to justify the rates.[98] After 12 months, costs and rates would be reviewed for inclusion in the proper basket and category, based on actual operating results.

73. *Comments*. Parties filed comments both on the issue of whether services are eligible for streamlined treatments and on the issue of what review applies at the next biennial filing. With respect to the first issue, most parties support streamlined tariff treatment of new services.[99] HWith respect to the definition of *de minimis*, USTA argues that the test for *de minimis* should include new services with projected revenues that meet either the 2 percent test or that will be less than $200,000 in aggregate on an annual basis. USTA asserts that the latter criterion will facilitate the introduction of new services by very small companies for whom the 2 percent standard alone would yield an unreasonably low threshold.[100]

74. Various commenters also seek to modify the requirement that the new service can be priced no higher than the price of a like service offered by the geographically closest price cap LEC. USTA suggests the price be no higher than any price cap LEC in the country.[101] NTCA argues that we should permit indexing of the rates of incentive plan carriers to those of price cap carriers, while MCI argues that we limit new prices to the tariffed industry average.[102] SBA asserts that the Commission must specify how a LEC should determine the LEC geographically closest so that carriers can avoid unnecessary costs associated with tariff investigations or complaints.[103] NTCA also argues that the closest price cap carrier may have little in common with the affected LEC, so that rates of one may not be applicable to the other.[104]

75. With respect to how new services are subsequently treated, USTA argues that the Commission should not require a burdensome cost-based filing within 12 months if the LEC continues to meet the *de minimis* revenue standard. It also contends that cost-based pricing of a new service could actually cause rates to increase and produce rate churn.[105] MCI agrees with the proposal that LECs 8 should make a cost-based filing after 12 months of operating experience.[106] MCI argues that the *de minimis* provision was proposed because conducting a cost of service study on a new service is difficult and the results may not be very reliable, given that there may be no direct information on costs. According to MCI, resetting the rates based on actual costs after one year, when better data are available, is most consistent with avoiding inaccurate and inefficient pricing signals in the market.[107]

76. *Discussion*. The purpose behind our new services proposal is to provide an administratively simple means of permitting small and mid-size LECs to introduce new services and compete with neighboring price cap LECs for customers. For purposes of the incentive plan and the Section 61.39 rules, the new service test of price cap shall apply. In this Order, we seek to provide small and mid-size LECs with the ability to introduce new services quickly, as well as to stimulate rivalry among LECs for new, innovative service offerings. This process also furthers our policy that innovative new services should be made available to the public as quickly as possible.[108]

77. Given these goals and the record support for them, we modify the new services criteria as follows. Except in cases in which the Commission specifically establishes requirements for a new service,[109] carriers electing the optional incentive plan may introduce any new service on a streamlined basis, regardless of the size of potential

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[97] We agree with USTA that our requirement that a LEC file "company-specific" rates when it leaves the incentive plan is not intended to deprive a group of affiliated telephone companies from filing a single tariff that is not an association tariff.

[98] NPRM, 7 FCC Rcd at 5026.

[99] *See e.g.*, Lincoln Comments at 6-7; Centel Comments at 8; ICC Reply at 6-7.

[100] USTA Comments at 20.

[101] *Id.*; *see also* PRTC Comments at 8; ALLTEL Comments at 6; Taconic Comments at 7; JSI Comments at 6-7; ITAG Comments at 7.

[102] NTCA Comments at 10-11; MCI Reply at 12-13.

[103] SBA Comments at 18.

[104] NTCA Comments at 10-11. *See also* GVNW Comments at 3 (NECA rates are a better surrogate).

[105] USTA Comments at 19. *Accord* Taconic Comments at 7; ICC Reply at 7.

[106] MCI Reply at 10.

[107] *Id.* at 10-12.

[108] *See* Section 7 of the Communications Act, 47 U.S.C. § 157.

[109] *E.g.*, Bell Operating Companies' Tariffs for the 800 Service Management System, Tariff F.C.C. No. 1 and 800 Data Base Access Tariffs, DA 93-491, (released Apr. 28, 1993).

revenues, so long as the price of the new service is at or below that of any neighboring price cap LEC. A new service that is not like a neighboring price cap LEC's service is not eligible for streamlined review, and must be cost supported using prospective data, as required by Section 61.38 of the Commission's rules. For services which are like a neighboring price cap LEC's services, streamlining shall mean the transmittal introducing the new service shall be presumed lawful, that no cost support is required, and that the transmittal can be filed on 14 days' notice. In place of cost support, the carrier shall attach a brief explanation of why the service is like an existing service offered by the closest price cap LEC, and an explanation or statements that the price is no higher than the price charged by the other LEC.[110]

78. We find that this structure is simple and should generally avoid unreasonable rates. For practical purposes, the upper limit on new service prices is likely to be the price charged by a neighboring LEC.[111] The lower limit on pricing is only a concern to the extent that a carrier might seek to set predatory prices. At this time, given the nascent state of competition for interstate access, and the small and mid-sized LECs' limited size, the potential for predatory pricing is extremely remote for the group of smaller carriers eligible for the optional incentive plan. Carriers have no incentive to price at a predatory level.[112] In addition, we impose no revenue limit specific to new services. Revenue from new services would factor into the LECs overall earnings and be subject to the same earnings limits as other services. Given that there is an adequate check on the reasonableness of new service pricing for price cap LECs, we perceive no utility in making the new services provision more complex by imposing requirements such as a *de minimis* showing or 12-month cost showings. The costs and demand levels associated with new services will simply be folded into the biennial cost-based tariff review process.[113] In the event anticompetitive behavior does occur, the injured party may provide evidence sufficient to overcome the presumption of reasonableness or raise the matter in a complaint.

79. We disagree with commenters that determining which price cap LEC is closest is a difficult question. In most cases, the service area of the optional incentive plan LEC seeking to make a competitive response will border the service area of the price cap LEC, or be associated with a Bell Operating Company or General Telephone Operating Company LATA. If the optional incentive plan LEC's service areas abut more than one price cap LEC, the cap becomes the highest rate charged by any adjoining price cap LEC. Therefore, there should be no ambiguity in determining which price becomes the cap for purposes of streamlined new services filings.

G. Infrastructure and Service Quality Reporting

80. *Notice.* The NPRM proposes that incentive plan carriers file quarterly service quality reports and biennial infrastructure reports. The NPRM tentatively concludes that these reports are necessary to protect ratepayers and otherwise allay concerns that a company may simply pursue the most cost effective means of maintaining its network to the detriment of service quality, and ultimately to the detriment of the company's infrastructure.[114]

81. *Comments.* According to USTA, LECs have a strong incentive to maintain a high level of service quality, and a strong financial disincentive to jeopardize customer relations by allowing service quality and network plant to deteriorate.[115] In view of the differences between optional incentive regulation and price cap regulation, the incentive plan does not require the same service quality reporting as price caps, USTA contends. For these reasons, USTA proposes that carriers electing optional incentive regulation should file reports similar, but not identical to the reports of price cap LECs. Further, USTA asserts that these reports should be filed on an annual, rather than a quarterly basis.[116] USTA proposes that the service quality reports include:

a. installation interval reports, reflecting the percentage of service installations completed within carrier established intervals;

b. repair interval reports, reflecting the average total number of hours to complete requested repairs;

c. network blockage reports, reflecting the ratio of blocked call attempts to total attempts at the busy hour; and,

d. switch downtime reports, reflecting the amount of time during the reporting period that a switch is totally down.[117]

82. USTA also argues that the Commission should not adopt new and burdensome infrastructure reporting requirements for LECS under the optional incentive regulation plan.[118] USTA states that in the price cap proceeding the Commission stated that it was less concerned with collecting infrastructure data from smaller price cap LECs, because "infrastructure monitoring of the largest eight LECS will provide a good indication of the general state of the infrastructure nationwide."[119] USTA contends

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[110] The presumption of lawfulness could be overcome with a showing that the rate filed is greater than the nearest price cap LEC's rate, or a persuasive argument that the service is not "like."

[111] It is, of course, possible that a low cost small or mid-sized company could border the territory of a high cost price cap LEC, rendering the new services cap unreasonable. In such a situation, should a optional incentive plan carrier elect to price at the maximum allowed, the complaint process is available to customers to obtain corrective action.

[112] *See LEC Price Cap Order* at 6824.

[113] This case is distinguishable from the concerns raised with respect to AT&T's Tariff 15. In Tariff 15, matching rates were found to be anticompetitive. With small carriers matching rates of the largest LECs, competition, because the small carriers lack market power, competition is enhanced by the addition of a second provider of a service.

[114] NPRM, 7 FCC Rcd at 5026-27.

[115] USTA Comments at 22.

[116] *Id.* at 23; *accord* MCI Reply at 13; ALLTEL Comments at 6; Lincoln Comments at 8; JSI Comments at 8-9; GVNW Comments at 4; ITAG Comments at 7; SBA Comments at 13; *see also* NTCA Comments at 7-8 (discussing service quality of small carriers). *But see* Centel Comments at 9 (objecting to any service quality or infrastructure monitoring).

[117] USTA Comments at 23-24.

[118] USTA Reply at 13.

[119] *Id.* at 14, citing *LEC Price Cap Order*, 5 FCC Rcd at n.479.

that to avoid placing unnecessary burdens on these carriers, and to ensure the widest participation in the incentive plan, the Commission should not adopt new infrastructure reporting requirements.[120]

83. *Discussion.* In the NPRM we sought a balance between our need to monitor infrastructure maintenance and developments, as well as service quality, of carriers participating in any type of incentive regulation and our desire to avoid the imposition of additional regulatory and administrative burden. We believe that the service quality reporting requirements proposed in the NPRM may be reduced, without diminishing the value of the information to the Commission. At the same time, we would be substantially reducing the reporting burden from that proposed in the NPRM. Therefore we will require incentive plan carriers to file the information required on the price cap FCC Form 43-05 service quality reports, on an annual basis.

84. With respect to infrastructure reports, we believe that annual infrastructure reports are preferable to the biennial infrastructure reports proposed in the NPRM. We believe this incentive plan will encourage companies to modernize their networks, resulting in greater efficiency, yielding lower costs and increased demand. In addition, the plan should prompt companies to modernize their networks. Thus, we conclude that it is in the public interest to monitor infrastructure developments annually. We further believe that the requirement of annual reports is not burdensome even for the smaller carriers. Therefore, incentive plan carriers will be required to file our Form 43-07 infrastructure reports each year in the same manner as price cap LECs.

H. Mergers and Acquisitions Under the Incentive Plan

85. *Notice.* The NPRM proposes that optional incentive plan carriers acquiring small, non-incentive plan carriers, would be required to convert the acquired companies to the incentive plan, unless the acquired company is an average schedule company. If the acquired company is an average schedule company, conversion to the incentive plan is optional. The NPRM also proposes that a non-incentive plan carrier acquiring an incentive plan carrier would be required to convert to the incentive plan.[121] This proposal tracks requirements in the price cap plan.

86. *Comments.* ALLTEL argues that the acquisition by an incentive plan carrier of a non-incentive plan carrier or the purchase by a non-incentive plan carrier of an incentive plan carrier, should not trigger any requirement to convert either carrier to a different plan. ALLTEL argues that each company should determine its regulatory methodology based on its unique characteristics.[122] JSI asserts that Section 61.39 and baseline regulated LECs should not be required to convert to the incentive plan if they acquire exchanges from an existing incentive plan LEC.[123] NTCA urges the adoption of a similar rule to that adopted in CC Docket No. 89-2, permitting LECS to retain their pre-transaction pooling status after mergers or acquisitions. NTCA states that those rules require pooling status waivers only where carriers, as the result of an acquisition or merger, would be returning more than 50,000 access lines to pooling status.[124]

87. *Discussion.* We adopt the NPRM's proposed rules addressing mergers and acquisitions involving a carrier subject to incentive regulation. As a point of clarification, if an acquiring company participates in the incentive plan for traffic sensitive rates only, the acquired properties would be converted to the incentive plan for traffic sensitive rates only as well.[125]

88. As NTCA states, in CC Docket No. 89-2, we adopted a rule under which LECs involved in mergers and acquisitions are permitted to retain their pre-transaction pooling status.[126] That rule was adopted in an effort to keep pooling rules neutral with regard to mergers and acquisitions. NTCA urges adoption of a similar rule with regard to acquisitions involving incentive plan carriers. We find that the reasoning for the price cap acquisitions rule is more pertinent to the incentive plan than the pooling rule.[127] The incentives and limitations facing a company that has both incentive plan and non-incentive plan affiliates would be very different from those facing a company that has both pooled and non-pooled affiliates. Companies that are allowed to retain both pooled and non-pooled affiliates under the limited exception authorized in the rules adopted in Docket 89-2 are all subject to non-incentive regulation. Thus, there is little incentive to shift costs between pooled and non-pooled affiliates, since all such companies' earnings are subject to the same earnings limits. By contrast, a company with both incentive plan and non-incentive plan affiliates has a significant incentive to shift costs from its incentive plan affiliates to its non-incentive affiliates, since the total dollars these latter companies will earn will be increased as their rate bases increase and they are not restricted to their actual historical costs. This difference justifies requiring the conversion rules described in the NPRM. As with the price cap rules, we will consider granting waiver petitions, on a case-by-case basis, for good cause shown to the mergers and acquisitions rules we herein adopt.

IV. HISTORICAL COST TARIFFS FOR SMALL COMPANIES (SECTION 61.39)

89. Section 61.39 permits small telephone companies to file tariffs for their traffic sensitive rates every two years in lieu of participating in the NECA traffic sensitive pool. The rates are developed from the company's actual historical costs, or historical average schedule settlements. Eligibility is limited to LECs serving 50,000 or fewer access lines, realizing total annual revenues of $40 million or less. In 1991, 39 small companies filed, on a non-pooled basis, traffic sensitive rates under Section 61.39. In this section of this Order we add an additional regulatory

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120 *Id.* at 14-15.
121 NPRM, 7 FCC Rcd at 5030, 5033.
122 ALLTEL Comments at 9-10.
123 JSI Comments at 14-15.
124 NTCA Comments at 15-16; *see also* USTA Reply at 21-22; NECA Reply at 11-12.
125 SBA's suggestion, that we permit baseline carriers to merge without FCC approval, is beyond the scope of this proceeding.
126 Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange carriers Involved in Mergers or Acquisitions, CC Docket No. 89-2, 5 FCC Rcd 231 (1989).
127 *See LEC Price Cap Order* at 6821.

option for some small companies by expanding these rules to provide for similar regulatory treatment of common line rates.

Expansion to Common Line

90. *Notice.* The NPRM proposed extending existing Section 61.39 rules to include common line tariffs. Common line rates would be based on historical costs (or the most recent average schedule settlements) and apply historical demand growth. Cost support would not be filed with the transmittal, except, cost support for SLC calculations. The NPRM tentatively applies the same common line formula for Section 61.39 carriers as is used for optional incentive plan carriers. Commission staff and LEC customers would be eligible to make reasonable requests for cost support data. Eligible companies could file either traffic sensitive rates or traffic sensitive and common line rates under Section 61.39.[128]

91. *Comments.* The LEC industry generally supports the Commission's proposal to extend the Section 61.39 filing option to include common line rates.[129] Taconic states that its participation in Section 61.39 regulation for its traffic sensitive rates has been a positive experience for the company and beneficial to its customers.[130] NTCA states that the current traffic sensitive option has not threatened pooling arrangements or the use of average schedules and, therefore, extending the option also should not introduce any substantial public interest detriments.[131]

92. With respect to the treatment of common line, USTA urges that we adopt a carrier common line demand adjustment formula identical to the formula it proposes for the optional incentive plan.[132] Similarly, ITAG offers a slightly different formula intended to split the benefits of demand growth between LECs and their interstate customers.[133] JSI asks that LECs be permitted to file end user rates under Section 61.39, but remain in the common line and traffic sensitive pools.[134] JSI asserts that the option of filing end user access charges while remaining in the common line pool exists today; however, such rates must comply with Section 61.38.[135]

93. Commenters also raise various other issues. Taconic urges that we apply the new services rules for incentive plan regulation to carriers filing under Section 61.39. Taconic argues that the new service rules should be modified to permit a Section 61.39 carrier to match the rate of any price cap LEC in the country. In addition, Taconic argues that having to perform subsequent historical cost studies to validate pricing for new services that only generate *de minimis* revenues would be overly burdensome and inefficient.[136] JSI asserts that the Commission should expand Section 61.39 to permit new service offerings to be treated as *prima facie* lawful and filed on 14 days' notice, subject to the two percent *de minimis* rule proposed for the incentive plan.[137] USTA asks that the Commission clarify that a reasonable request by an interexchange carrier to review a Section 61.39 carrier's cost support data must be made during the applicable tariff review period.[138] Taconic asks that the Commission permit carriers the flexibility to return to either or both NECA pools since the impact of competition, state-mandated rulings, and technological changes standards are unforeseeable and substantially increase risks to smaller carriers.[139]

94. *Discussion.* Commenting parties argue that the application of Section 61.39 to traffic sensitive rates has been a success. Our own review of the rates filed pursuant to Section 61.39 in comparison with those rate filed by NECA and other carriers using traditional rate of return principles demonstrates the success of these rules. As we stated in the NPRM, Section 61.39 rates have been consistently lower than NECA rates for traffic sensitive rate elements. We also find that the rates filed by companies using Section 61.39 have been compensatory. We therefore expand Section 61.39 to include common line rate elements.

95. We adopt the treatment of subscriber line charges as proposed in the NPRM. We also adopt the same demand growth adjustment formula as for the optional incentive plan discussed in Section III. D. 3 above. Like the optional incentive plan, these small company rules present a two-year tariff period, based on historical costs, and the concept of a regulatory lag. We also include the same streamlined new services approach. Commenters have offered no compelling reason to provide a demand growth formula different from that of the optional incentive plan. We believe this formula strikes the best balance between simplicity of administration and fairness to companies and customers. As requested by Taconic, mid-course corrections will be evaluated on a case-by-case basis; and, NECA is directed to file terms and conditions for the common line tariffs under Section 61.39. We will consider carriers' petitions for waiver of applicable rules to permit them to return to NECA pools using the same principles we have in the past.

96. In addition, we also adopt the new services rules applicable to the incentive plan for Section 61.39 carriers. Our commitment to the expeditious deployment of new services is equally strong for the smallest carriers as for the larger LECs, and we believe that the lower regulatory burdens and optional regulatory flexibility are necessary to ensure the smallest LECs have an opportunity to make a competitive response to other new service offerings.[140]

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[128] NPRM, 7 FCC Rcd at 5028.

[129] USTA Comments at 35. *See also* Taconic Comments at 3; GVNW Comments at 5 (arguing that the LEC should retain the option of returning to NECA pools on an annual basis).

[130] Taconic Comments at 3.

[131] NTCA Comments at 11.

[132] USTA Comments at 36. *See also* GVNW Comments at 5.

[133] ITAG Comments at 8-10. ITAG's proposal requires that we select both an inflation adjustment and a productivity offset factor, similar to our price cap plan. However, ITAG argues that the price cap values established for the productivity offset factor are too high to apply in this context.

[134] JSI Comments at 11.

[135] *Id.* at n.19.

[136] Taconic Comments at 5-6 (requesting that common line mid-course filings be evaluated on a case-by-case basis).

[137] JSI Comments at 11-13.

[138] USTA Comments at 37.

[139] Taconic Comments at 4.

[140] As a point of clarification, we point out that LECs filing tariffs pursuant to Section 61.39 may lower rates below those derived from historical costs as long as the rates can be shown to be cost-based.

We decline to adopt modifications suggested by the parties for the same reasons we refused to adopt them for the incentive plan carriers.

V. BASELINE RATE OF RETURN REGULATION (SECTION 61.38 AND PART 69)

97. Current rules generally require carriers subject to rate of return regulation, including NECA filing on behalf of carriers participating in either the common line or traffic sensitive pools, to file tariffs with the Commission every year.[141] Supporting information required with annual tariff filings includes: a cost of service study for the previous year; a study of projected costs for the tariff period; and estimates of the effect of proposed tariff changes on traffic and revenues.[142] The specific data formats for the supporting information are detailed in a Tariff Review Plan (TRP), which is released by the Common Carrier Bureau each year.[143] The level of cost, demand, and revenue data required by the TRP varies, with greater detail demanded of the larger carriers. The TRP divides companies into three groups -- Tier 1, Tier 2A, and Tier 2B -- for purposes of establishing different levels of cost support data that must be filed as well as reflecting different regulatory requirements applicable to different classes of carriers.[144] The NPRM and this Order refer to these existing rate of return requirements as the "baseline" requirements for rate of return carriers. Pursuant to this Order, baseline regulation is applicable to NECA and individual companies or groups of companies that choose not to participate in the NECA pools and choose not to elect one of the other two alternative regulatory options. The rules and level of detail carriers are required to file in annual tariff filings will be substantially the same as those that were applied to all LECs prior to the implementation of price caps.[145]

98. While we believe it is important to offer small and mid-size LECs the opportunity to continue to file rates pursuant to existing rate of return regulation, due in large measure to the diversity of this group, we believe some simplification can be introduced that will not substantially alter the *status quo*, particularly for those carriers that participate in the NECA pools. Therefore, we amend our rules to require baseline tariff filings every two years, except for NECA. This action does not prevent a carrier from filing more frequently, but merely provides the opportunity to file tariffs less frequently if the carrier chooses. We continue to require NECA to file annual tariffs for the reasons stated below.

A. Frequency of tariff filings

99. *Notice.* The NPRM proposed that carriers filing tariffs under Section 61.38 may file only every two years.

100. *Comments.* USTA supports the biennial tariff filing proposal as long as baseline carriers retain the option of filing more frequently. USTA asserts that the ability to make mid-course adjustments when appropriate must be retained.[146] The SBA concurs with the Commission's finding that biennial filings will not impede our statutory mission.[147] AT&T also states that annual filings are not necessary for the small LECs remaining under baseline regulation, and that biennial filings will reduce administrative costs for both the Commission and all other interested parties.[148]

101. NECA asserts that it must have the ability to file annual tariff filings.[149] Supporting its contention that biennial filings would be inequitable, NECA states that based on its current view of 1990-1991 cost and demand, if NECA had used 1989 as the base year, it would have experienced a revenue shortfall of $31 million and pool earnings approximately 125 basis points below authorized (10.01 percent) would have resulted.[150] NECA adds that the Commission has no statutory obligation to prescribe tariff intervals, and in doing so, may well cause carriers to underearn.[151]

102. *Discussion.* The purpose underlying our proposal to require baseline tariff filings every two years instead of annually was that biennial filings would still permit us to meet our statutory obligations to assure that rates are reasonable while substantially reducing administrative burdens on companies. At the same time, we would not be precluding a carrier subject to baseline regulation from filing more frequently. Because biennial filings are considered an option, annual filings made by baseline carriers would not be considered mid-course filings. Therefore, we adopt biennial filing requirements for baseline carriers, except for NECA. Because NECA administers pools for a large number of small carriers, projecting costs and demand for greater than one-year periods is difficult. We believe, at this time, requiring NECA to file information projecting data for two years would be unnecessarily complex. Therefore, NECA will continue to be required to file tariffs annually.

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[141] 47 C.F.R. § 69.3. As discussed above, current rules provide that small companies, serving 50,000 access lines or fewer, that qualify as NECA subset 3 carriers (annual operating revenues of $40 million or less), may opt to file traffic sensitive rates every other year. 47 C.F.R. § 69.3(f).

[142] 47 C.F.R. § 61.38(b).

[143] *See, e.g.,* Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, 7 FCC Rcd 1477 (1992)(*TRP Order*).

[144] *Id.* at 1478.

[145] This level of detail was deemed necessary for the Commission to review adequately tariff proposals of the largest carriers, when all LECs were subject to the same form of regulation and all participated in the common line pool administered by NECA. As already noted, approximately 94 percent of the LEC industry (access lines, revenues and minutes of use) is now subject to price cap regulation and all pooling is optional.

[146] USTA Comments at 34. *See also* ALLTEL Comments at 8; Lincoln Comments at 8.

[147] SBA Comments at 19.

[148] AT&T Comments at 9.

[149] NECA Comments at 3.

[150] NECA notes that, if a purely historical approach had been substituted for a prospective methodology, it would have experienced an earnings shortfall of $29 million. NECA states that it has performed additional analysis on the data underlying its currently effective rates, using various models for trending historical data to produce test period revenue requirements and demand. NECA states that each analysis based on historical data demonstrated that it would have experienced significant revenue shortfalls and underearnings with the biennial filing requirement. NECA Comments at n.14.

[151] NECA Reply at 6-7.

B. Historical Versus Prospective Costs

103. *Notice.* The NPRM suggested that simple extrapolations of historical costs would be less burdensome than the type of projections now used.

104. *Comments.* NECA argues that it must retain the ability to base rates on prospective costs.[152] NECA does agree that the use of historical data and trends to determine what prospective costs and demand will be is important. NECA disagrees, however, that historical data should be required as the sole basis for establishing compensatory prospective rates. NECA argues that an important component of ratemaking is consideration of current factors such as technological advances and FCC rule changes.[153] NECA also asserts that a shift to historical costs requires complex rule changes, which are beyond the scope of this docket.[154] USTA also argues that reliance on historical costs and/or simple extrapolations will not permit baseline LECs and NECA to fully account for future cost-intensive events, such as conversion to SS7 and 800 database implementation, state infrastructure requirements, and changes to the North American numbering plan.[155] USTA further argues that use of historical costs and demand under baseline regulation might bias long-term earnings results to the detriment of rate-of-return carriers.[156] Other carriers argue strongly that use of an historical-only cost support approach should be optional.[157]

105. AT&T and MCI support the Commission's proposal that small and mid-size rate-of-return LECs file projected costs and demand data "developed as simple extrapolations of historical costs and demand."[158] AT&T asserts that historical data are ascertainable and verifiable, and basing projections on extrapolations of historical trends is a straightforward and consistent forecasting methodology. AT&T states that this method would reduce filing burdens of companies and simplify the overall tariff filing process.[159]

106. *Discussion.* Based on the record before us, we are not prepared at this time to introduce substantial reform into the baseline process. Most comments addressing baseline reform came from small LECs opposing reform. No sufficient record was established refuting this opposition or supporting any clear direction for baseline reform. Further, such reform would radically alter the optional nature of other regulatory programs established in this proceeding. Finally, a number of proceedings remain open which, to varying degrees, address fundamental aspects of baseline regulation. For example, the Commission recently adopted a Notice of Proposed Rulemaking to establish safeguards to improve the administration of the interstate access tariff and revenue distribution processes.[160] In addition, NECA's most recent revision to its Universal Service Fund rates are under investigation.[161] While these other proceedings are pending, NECA has not been forthcoming with workable proposals for reform and has argued strongly against those proffered in the NPRM. We believe that a greater reliance on historical costs remains a worthy objective and should be a basis of future discussions.[162]

C. Treatment of New Services and Pricing Flexibility

107. *Notice.* The NPRM proposed streamlined treatment for new services similar to that proposed for the optional incentive regulation plan.[163] The NPRM did not propose to give baseline rate of return carriers added pricing flexibility.

108. *Comments.* NECA contends that because it is difficult for small companies and NECA to develop new service rates under the current rules in a timely manner, efforts to simplify the introduction of new services would benefit NECA companies. NECA argues that the streamlined procedures for new services should include a presumption of lawfulness for new services projecting revenues of less than 2 percent of the combined common line and traffic sensitive pools' total interstate access revenue requirement. NECA also asks that the Commission authorize NECA to set its pool rates for new services at a level not to exceed the highest filed price cap carrier rate in the country.[164] Asserting that small and mid-size company rates are typically much higher than those of price cap carriers, NECA asks that the Commission also permit NECA the option of filing new service rates based on a ratio of price cap element to subelement rates, as long as the rate meets the *de minimis* level of revenues standard.[165]

109. MCI maintains that the rates for a new service should be determined using total service long run in-

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[152] NECA Comments at 5-9.

[153] NECA Reply at 5 (also arguing that the administrative savings of a purely historical approach have not been calculated based on existing tariff filing requirements).

[154] NECA Comments at 6-9 (citing the annual certification of average schedule carriers and the pool notification rules as two rules that would have to be changed).

[155] USTA Comments at 31-32 (arguing that the Commission should focus instead on simplifying its tariff review plan requirements). *See also* NECA Comments at 6-9.

[156] USTA Comments at 32-35 (arguing that a LEC under baseline regulation should be permitted to earn up to 100 basis points above the authorized rate of return before its rates are considered to be unreasonable).

[157] ALLTEL Comments at 8; Lincoln Comments at 9; JSI Comments at 13-14; SBA Comments at 21.

[158] AT&T Comments at 9; MCI Reply at 13.

[159] *Id.*

[160] Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes, CC Docket no. 93-6, RM 7736, released February 11, 1993.

[161] National Exchange Carrier Association, FCC Tariff No. 5, Transmittal No. 518.

[162] While simplification of our tariff review plan is a goal we share with the industry, the recommendations made by USTA and NECA are beyond the scope of this proceeding. *See* NECA Comments at 8-9 (recommending elimination of most TRP reports); *see also* USTA Comments at 30-31.

[163] NPRM, 7 FCC Rcd at 5029-30.

[164] NECA Comments at 9-10. *See also* NTCA Comments at 12; Lincoln Comments at 9; JSI Comments at 13; *but see* SBA Comments at 23 (allow new service rates to be based on a like service of any similarly-situated carrier, regardless of the type of regulation used to file the rate being used); NECA Reply at 9-10 (presenting a national average ratio approach comparing average price cap rates to subelement rates as the test of whether a new service should be streamlined).

[165] *See* NTCA Comments at 3 (arguing for more fundamental deregulation of small companies).

cremental cost prospective forecasting.[166] According to MCI, a rate of return LEC must not be given a choice of alternative methods by which to calculate different rates it charges.[167]

110. With respect to pricing flexibility, NECA proposes that traditional rate of return carriers should be permitted the option to change rates by 5 percent up or down during the tariff period.[168] NECA proposes that these filings should be made on 14 days' notice with a presumption of lawfulness provided that a showing of revenue neutrality on a prospective basis is included in the filing. NECA also recommends that rate relationships established through the use of this pricing flexibility should be permitted to continue into subsequent tariff periods. Under this NECA proposal, the option could be exercised if it results in no cumulative revenue impact based on prospective test period demand as measured within either the traffic sensitive-switched or traffic sensitive-special access rate groupings. NECA notes that it is not proposing pricing flexibility for common line or end user rate elements. NTCA asserts that the pricing flexibility components of the optional incentive regulation plan should be extended to the rest of the non-price cap industry.

111. The ICC argues that the NECA and OPASTCO proposals appear to provide artificial incentives to encourage additional pooling. According to ICC, LECs that wish greater flexibility in pricing must be willing to bear some risk by ensuring ratepayers that they will become more efficient. Bearing greater risk demands exiting the NECA pools.[169]

112. *Discussion.* We concluded above that, with the exception of permitting baseline companies other than NECA to have the option of filing tariffs on a biennial basis, justified by cost and demand support, baseline regulation will remain unchanged. Therefore, no additional risk is being imposed on baseline regulated carriers. Accordingly, it is inappropriate to provide any reward as might be afforded by streamlined treatment of new services or broader earnings bands. In addition, the parties have not justified pricing flexibility at this time, particularly for carriers participating in pools. Companies seeking such flexibility can elect one of the other options we are establishing in this Order.[170]

D. Incentive Regulation and Regulatory Reform within NECA

113. *Notice.* The NPRM sought comment on means of permitting incentive options within the NECA pools.[171]

114. *Comments.* NECA, although not proposing any specific incentive-based options here, proposes a rule revision which would enable the implementation of incentive options within the pool in the future through NECA filing a tariff.[172] NTCA agrees that NECA should be afforded maximum flexibility to design a plan to introduce incentives to become more efficient to the pools.[173]

115. NTCA and NECA assert that more telephone companies should be permitted to receive settlements based on interstate average schedules.[174] However, the ICC opposes greater participation in average schedule costing methodologies. The ICC argues that movement away from the pooling process is the more appropriate form of regulation.[175]

116. *Discussion.* We are not adopting NECA's proposal to permit it to introduce incentive regulation into the pool settlement process by filing a tariff. Important changes in regulatory mechanisms are more properly evaluated in a notice and comment proceeding. However, we encourage NECA to continue to work on reforms to introduce optional incentive plans into the pooling process, which would be considered in the context of a separate proceeding, a waiver petition or a rulemaking.[176] We also find requests to permit cost companies to convert to average schedule status to be beyond the scope of this proceeding.

VI. IMPLEMENTATION SCHEDULE

117. We will schedule implementation of these rules for an effective date of January 1, 1994. We anticipate that the Common Carrier Bureau can implement appropriate mechanisms to meet this schedule, including revisions to the annual Tariff Review Plan.

VII. REGULATORY FLEXIBILITY ANALYSIS AND PAPERWORK REDUCTION

118. *Notice.* The NPRM concludes that the Regulatory Flexibility Act is not applicable to this proceeding based upon the Commission's prior findings that all LECs are dominant.[177]

119. *Comments.* The SBA asserts that the Commission's position represents a constricted view of the Regulatory Flexibility Act; the SBA gives a broader interpretation to the Act. SBA contends that the Regulatory Flexibility Act also permits an agency for purposes of complying with the Act to select a different definition of small business after consultation with the Office of Advocacy of the

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166 MCI notes: In the Matter of transport Rate Structure and pricing, CC Docket No. 91-213, Comments of MCI Telecommunications, November 22, 1991, p. 18.

167 MCI Comments at 13-14.

168 NECA Comments at 13-14.

169 ICC Reply at 7-8.

170 Some commenters have suggested we increase the buffer zone around baseline carriers earnings to 100 basis points. Centel Comments at 11; NECA Reply at 10. *But see* MCI Reply at 18. This issue is beyond the scope of this proceeding and is more appropriately raised in CC Docket No. 92-133.

171 NPRM, 7 FCC Rcd at 5030.

172 NECA Comments at 16. *See also* ALLTEL Comments at 10; GVNW Comments at 6; NTCA Reply at 9-10.

173 NECA also proposes Part 69 rule changes to reflect the settlement methods in place since 1984 and to remove the inaccurate references to computing hypothetical net balances. NECA states that existing sections 69.608 through 69.610 have never been used for settlement purposes. NECA Comments at 20-21. *See also* NTCA Comments at 13-14. These issues are beyond the scope of this docket.

174 NTCA Comments at 14; NECA Comments at 16-20; *see also* USTA Reply at 20-21; JSI Reply at 2-3; NTCA Reply at 10-11.

175 ICC Reply at 8.

176 Similarly, MCI's suggestion that we consider Universal Service Fund reform is beyond the scope of this docket. *See* MCI Comments at 2-3.

177 NPRM, 7 FCC Rcd at 5031.

SBA. Nothing in the Act, according to SBA, requires an agency to adopt the definition of a "small entity" provided in Section 3 of the Small Business Act to carry out its statutory mandate. The SBA interprets the Act to give the FCC sufficient discretion to adopt one size standard for regulatory purposes and another for compliance with the analytical requirements of the Act. Therefore, SBA asserts, the Commission can analyze the impact of these rules while maintaining its distinction between dominant and non-dominant common carriers.[178] SBA continues, that even if the Commission asserts that such dual standards are unworkable, SBA disagrees with the conclusion that small LECs are dominant. SBA states that the Commission argues that small LECs are monopoly providers of telecommunication services and by definition dominant; yet, the Commission scatters throughout the NPRM references to the competition faced by smaller LECs. The SBA states that Commission precedent exists for disparate regulatory treatment of different portion of an individual carrier's service.[179]

120. *Discussion.* We certify that the Regulatory Flexibility Act[180] is not applicable to the rule changes we adopt in this proceeding. Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. Accordingly, we reject the assertions of SBA to the contrary.

121. As part of our analysis of the regulation adopted in this Memorandum Opinion and Order, however, this Commission has considered the impact of the proposal on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines. As a result of our decision to make all of the new regulatory regimes optional, no small carrier will be forced to change the method by which it is regulated. All support and subsidy mechanisms, such as our High Cost Fund and long term support mechanism, remain in effect. The average schedule status of companies is not challenged. These rules permit greater flexibility and introduce the potential rewards of incentive regulation on an optional basis, while essentially preserving the *status quo* for companies that do not deem it appropriate to change.

122. Public reporting burden for this collection of service quality and infrastructure reporting information is estimated to average 833 hours per service quality response, and 10 hours per infrastructure response.

VIII. ORDERING CLAUSES

123. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, Part 61, Part 65, and Part 69, and Sections 61.38, 61.39, 61.50, 61.58, 65/700, and 69.3, ARE AMENDED as set forth in Appendix B to this Order.

124. IT IS FURTHER ORDERED that this Report and Order will be effective thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTERS

ALLTEL Service Corporation (ALLTEL)

American Telephone and Telegraph Company (AT&T)

Central Telephone Company (Centel)

Fred Williamson & Associates, Inc. (FW&A)

GVNW, Inc./Management (GVNW)

Illinois Commerce Commission (ICC)

Independent Telephone Access Group (ITAG)

> The members of ITAG are: Champaign Telephone Company, Chillicothe Telephone Company, Chouteau Telephone Company, Granite State Telephone Company, Inc., Mashell Telephone Company, Inc., Millry Telephone Company, Inc., Northern Arkansas Telephone Company, Inc., Pigeon Telephone Company, Totah Telephone Company, Waitsfield-Fayston Telephone Company, Inc., and Western New Mexico Telephone Company.

John Staurulakis, Inc. (JSI)

Lincoln Telephone and Telegraph Company (Lincoln)

MCI Telecommunications Corporation (MCI)

National Exchange Carrier Association (NECA)

National Telephone Cooperative Association (NTCA)

National Association of Regulatory Utility Commissioners (NARUC)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

PTI Communications (PTIC)

Puerto Rico Telephone Company (PRTC)

Ronan Telephone Company (Ronan)

Taconic Telephone Corp. (Taconic)

Tallon, Cheeseman and Associates, Inc. (TCA)

U.S. Small Business Administration (SBA)

United States Telephone Association (USTA)

The following filed reply comments in support of Comments filed by GVNW:

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[178] SBA Comments at 25-26.
[179] SBA Comments at 25-27.
[180] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).

Arnold Reinhold, Cambridge Tel. Co., Canby Tel. Assn., Citizens Tel. Co., Concord Tel. Co., Cordova Tel. Co., Dell Tel. Coop., Emery Tel. Co., Farmers Mutual Tel. Co., Home Tel. Co., Manti Tel. Co., McDaniel Tel. Co., Plains Cooperative Tel. Co., Roggen Tel. Coop., Siskiyou Tel. Co., South Central Tel. Co., and Western River Tel. Co.

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61, 65, and 69 are amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is amended by revising paragraph (e) to read as follows:

§ 61.3 Definitions.

* * * * *

(e) *Base period.* For carriers subject to §§ 61.41-49, the 12-month period ending six months prior to the effective date of annual price cap tariffs, or for carriers regulated under § 61.50, the 24-month period ending six months prior to the effective date of biennial optional incentive plan tariffs.

* * * * *

3. Section 61.38 is amended by revising paragraph (a) to read as follows:

§ 61.38 Supporting Information to be submitted with letters of transmittal.

(a) *Scope.* This Section applies to dominant carriers whose gross annual revenue exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. Local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602 of this chapter may submit Access Tariff filings for that study area pursuant to either this section or § 61.39. However, the Commission may require any carrier to submit such information as may be necessary for a review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42 (a), (b), (d), (e), and (g), promotional offerings that relate to services subject to price cap regulation, tariff filings proposing rates for services identified in §61.50, or to tariff filings, other than promotional filings, filed on 14 days' notice pursuant to § 61.58(c)(6).

* * * * *

4. Section 61.39 is amended by revising paragraphs (a) and (b), and adding a new paragraphs (c) and (d) to read as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after April 1, 1989, by local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in Sec. 69.602.

(a) *Scope.* This Section provides for an optional method of filing for any local exchange carrier that is described as subset 3 carrier in § 69.602, which elects to issue its own Access Tariff for a period commencing on or after April 1, 1989, and which serves 50,000 or fewer access lines in a study area as determined under § 36.611(a)(8) of the Commission's Rules. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in § 61.42(d), (e), and (g), which filings are submitted by carriers subject to price cap regulation, or to tariff filings proposing rates for services identified in § 61.50, which filings are submitted by carriers subject to optional incentive regulation.

(b) *Explanation and data supporting tariff changes.* The material to be submitted for either a tariff change or a new tariff which affects rates or charges must include an explanation of the filing in the transmittal as required by § 61.33. The basis for ratemaking must comply with the following requirements. Except as provided in paragraph (b)(5) of this section, it is not necessary to submit this supporting data at the time of filing. However, the local exchange carrier should be prepared to submit the data promptly upon reasonable request by the Commission or interested parties.

(1) For a tariff change, the local exchange carrier that is a cost schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, a cost of service study for Traffic Sensitive elements for the most recent 12 month period with related demand for the same period.

(ii) For subsequent filings, a cost of service study for Traffic Sensitive elements for the total period since the local exchange carrier's last annual filing, with related demand for the same period.

(2) For a tariff change, the local exchange company that is an average schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, the local exchange carrier's most recent annual Traffic Sensitive settlement from the National Exchange Carrier Association pool.

(ii) For subsequent filings, an amount calculated to reflect the Traffic Sensitive average schedule pool settlement the carrier would have received if the

carrier had continued to participate, based upon the most recent average schedule formulas approved by the Commission.

(3) For a tariff change, the local exchange carrier that is a cost schedule carrier must propose Common Line rates based on the following:

(i) For the first period the Carrier Common Line revenue requirement shall be determined by a cost of service study for the most recent 12 month period. The Carrier Common Line revenue requirement shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

(ii) For subsequent filings, the Carrier Common Line revenue requirement shall be determined by a cost of service study for the total period since the carrier's last biennial access filing. The Carrier Common Line revenue requirement determined in this manner shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

(4) For a tariff change, the local exchange carrier which is an average schedule carrier must propose common line rates based on the following:

(i) For the first period, the local exchange carrier's most recent annual Common Line settlement from the National Exchange Carrier Association that is conclusively binding upon the carrier and the Association. This carrier common line settlement amount shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

(ii) For subsequent filings, an amount calculated to reflect the average schedule pools settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average schedule Common Line formulas approved by the Commission. This amount shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

(5) For End User Common Line charges included in a tariff pursuant to this Section, the local exchange carrier must provide supporting information for the two-year historical period with its letter of transmittal in accordance with §61.38.

* * * * *

(d) Rates for a new service that is the same as that offered by a price cap regulated local exchange carrier providing service in an adjacent serving area are deemed presumptively lawful, if the proposed rates, in the aggregate, are no greater than the rates established by the price cap local exchange carrier. Tariff filings made pursuant to this paragraph must include the following:

(1) A brief explanation of why the service is like an existing service offered by a geographically adjacent price cap regulated local exchange carrier; and

(2) Data to establish compliance with this subsection that, in aggregate, the proposed rates for the new service are no greater than those in effect for the same or comparable service offered by that same geographically adjacent price cap regulated local exchange carrier. Compliance may be shown through submission of applicable tariff pages of the adjacent carrier; a showing that the serving areas are adjacent; any necessary explanations and work sheets.

(e) Average schedule companies filing pursuant to this Section shall retain their status as average schedule companies.

* * * * *

5. Section 61.45 is amended by revising paragraph (d)(2) to read as follows:

* * * * *

(d) (2) Local exchange carriers specified in § 61.41(a)(2) or (a)(3) shall also make such temporary exogenous cost changes as may be necessary to reduce PCIs .o give full effect to any sharing of base period earnings required by the sharing mechanism set forth in the Commission's Second Report and Order in Common carrier Docket No. 87-313, FCC 90-314, sdopted September 19, 1990. Such exogenous cost changes shall include interest, computed at the prescribed rate of return, from the day after the end of the period giving rise to the adjustment, to the midpoint of the period when the adjustment is in effect.

* * * * *

6. Section 61.50 is added to read as follows:

§ 61.50 *Scope.* Optional incentive regulation for rate of return local exchange carriers.

(a) This section shall apply on an elective basis, to local exchange carriers for either traffic sensitive rates only or for both traffic sensitive and common line rates. Carriers electing the plan for traffic sensitive rates only must participate in the Association common line pool. Affiliation with average schedule companies shall not bar a carrier from electing optional incentive regulation provided the carrier is otherwise eligible.

(b) If a telephone company, or any one of a group of affiliated telephone companies, files an optional incentive regulation tariff in one study area, that telephone company and its affiliates, except its average schedule affiliates, must file incentive plan tariffs in all their study areas.

(c) The following rules apply to telephone companies subject to this section, that become involved in mergers, acquisitions, or similar transactions, except that mergers

with, acquisitions by, or other similar transactions with companies subject to price cap regulation, as that term is defined in § 61.3(w), shall be governed by § 61.41(c).

(1) Any telephone company subject to this section that is a party to a merger, acquisition, or similar transaction, shall continue to be subject to incentive regulation notwithstanding such transaction.

(2) Where a telephone company subject to this section acquires, is acquired by, merged with, or otherwise becomes affiliated with a telephone company that is not subject to this section, the latter telephone company shall become subject to optional incentive plan regulation no later than one year following the effective date of such merger, acquisition, or similar transaction and shall accordingly file optional incentive plan tariffs to be effective no later than that date in accordance with the applicable provisions of this Part 61.

(3) Notwithstanding the provisions of paragraph (c) (2) of this section, when a telephone company subject to optional incentive plan regulation acquires, is acquired by, mergers with, or otherwise becomes affiliated with a telephone company that qualifies as an "average schedule" company, the latter company may retain its "average schedule" status or become subject to optional incentive plan regulations in accordance with § 69.3(i)(3) of this chapter and the requirements referenced in that section.

(d) Local exchange carriers that are subject to this section shall not withdraw from optional incentive regulation until the end of two, two-year tariff periods. If a local exchange carrier withdraws from optional incentive plan regulation, it must file company-specific tariffs under the provisions of § 61.38 for four years before it may again elect to enter incentive plan regulation; such carrier may not participate in the applicable Association tariff during that four years. After the four year period, the carrier may either return to the incentive plan, or remain under § 61.38 regulation.

(e) Each local exchange carrier subject to this section shall establish the baskets of services, including service categories, as identified in § 61.42 (d) and (e).

(f) Each local exchange carrier subject to optional incentive regulation shall exclude from its baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

(g) New services, other than those within the scope of paragraph (f) of this section, must be included in the affected basket at the first two-year tariff filing following completion of the two-year tariff period in which they are introduced. To the extent that such new services are permitted or required to be included in new or existing service categories within the assigned basket, they shall be so included at the first two-year tariff filing following completion of the two-year tariff period in which they are introduced.

(h)(1) Except as provided in paragraph (c)(4) of this section, in connection with any optional incentive plan tariff filings proposing rate changes, the carrier must calculate an index for each affected basket as determined by the Common Carrier Bureau.

(2) In connection with any tariff filed under this section proposing changes to rates for services in the basket designated in paragraph (e) of this section, the maximum allowable increase or decrease in a basket shall be limited to ten percent over the two-year tariff period.

(i) Rates for a new service that is the same as that offered by a price cap regulated local exchange carrier providing service in an adjacent serving area are deemed presumptively lawful, if the proposed rates, in the aggregate, are no greater than the rate established by the price cap local exchange carrier. Tariff filings made pursuant to this paragraph must include the following:

(1) A brief explanation of why the service is like an existing service offered by a geographically adjacent price cap regulated local exchange carrier; and

(2) Data to establish compliance with this subsection that, in aggregate, the proposed rates for the new service are no greater than those in effect for the same or comparable service offered by that same geographically adjacent price cap regulated local exchange carrier.

(j) The maximum allowable rate of return on earnings based on rates filed by a local exchange carrier subject to this section, shall be determined by adding a fixed increment of one and one-half percent to the carrier's prescribed rate of return. Rates of local exchange carriers subject to this section that result in earnings less than three-quarters percent below the carrier's prescribed rate of return may be retargeted to three-quarters percent below the carrier's prescribed rate of return, in a mid-course tariff filing.

(k) Local exchange carriers filing common line rates under this section must propose Carrier Common Line rates based on the following:

(1) For the first period the Carrier Common Line revenue requirement shall be determined by a cost of service study for the most recent 12 month period. The Carrier Common Line revenue requirement shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

(2) For subsequent filings, the Carrier Common Line revenue requirement shall be determined by a cost of service study for the total period since the carrier's last biennial access filing. The Carrier Common Line revenue requirement determined in this manner shall be divided by a factor equal to the demand over the preceding 12-month period, multiplied by the ratio of Carrier Common Line minutes of use during the most recent 12-month period over Carrier Common Line minutes of use in the preceding 12-month period.

7. Section 61.58 is amended by adding new paragraph (e) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(e) *Carriers subject to optional incentive regulation.* This paragraph applies only to carriers subject to Section 61.50 of this Part. Such carriers must file tariffs according to the following notice periods: H&1 (1) For initial and renewal tariff filings whose effective date coincides with the start of any two-year tariff period as defined in § 69.3(f) of this chapter, filings must be made on not less than 90 days' notice.

(2) For rate revisions made pursuant to § 61.50 (g) and (i), and § 61.39(d), tariff filings must be made on not less than 14 days' notice.

PART 65 -- INTERSTATE RATE OF RETURN PRESCRIPTION AND METHODOLOGIES

1. The Authority citation for Part 65 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat., 1006, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 65.700 is amended by adding a new paragraph (d) to read as follows:

§ 65.700 Determining the maximum allowable rate of return.

* * * * *

(d) The maximum allowable rate of return for rates filed by local exchange carrier subject to § 61.50 shall be determined by adding a fixed increment of one and one-half percent to the carriers prescribed rate of return.

PART 69 -- ACCESS CHARGES

1. The Authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat, 1066, 1070, 1072, 1077, 1094, as amended 47 U.S.C. §§ 154, 201, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 69.3 is amended by revising the first sentence of paragraph (a), revising the first sentence of paragraph (e), and paragraph (i) introductory text, paragraph (i)(1), paragraph (i)(3) and adding a new paragraph (j) to read as follows:

§ 69.3 Filing of access service tariffs.

(a) Except as provided in paragraphs (g) and (h) of this section, a tariff for access service shall be filed with this Commission for a two-year period. * * *

* * * * *

(e) A telephone company or group of telephone companies may file a tariff that is not an association tariff, except that a group rate for non-affiliated telephone companies may not be filed under Section 61.50; *e.g.*, the Association. * * *

* * * * *

(i) The following rules apply to the withdrawal from Association tariffs under the provision of paragraphs (e)(6) or (e)(9) of this section or both by telephone companies electing to file price cap tariffs pursuant to § 69.3(h) or optional incentive plan tariffs pursuant to § 61.50 of this chapter.

(1) In addition to the withdrawal provisions of § 69.3(e)(6) and (9), a telephone company or group of affiliated telephone companies that participates in one or more Association tariffs during the current tariff year and that elects to file price cap tariffs or optional incentive regulation tariffs effective July 1 of the following tariff year, shall give the Association at least 6 months' notice that it is withdrawing from Association tariffs, subject to the terms of this Rule, to participate in price cap regulation or optional incentive regulation.

* * * * *

(3) Notwithstanding the provisions of § 69.3(e)(3), (6), and (9), in the event a telephone company withdraws from all Association tariffs for the purpose of filing price cap tariffs or optional incentive plan tariffs, such company shall exclude from such withdrawal all "average schedule" affiliates and all affiliates so excluded shall be specified in the withdrawal. However, such company may include one or more "average schedule" affiliates in price cap regulation or optional incentive plan regulation provided that each price cap or optional incentive plan affiliate relinquishes "average schedule" status and withdraws from all Association tariffs and any tariff filed pursuant to 61.39(b)(2) of this chapter. *See generally* §§ 69.605(c), 61.39(b) of this chapter; MTS and WATS Market Structure: Average Schedule Companies, Report and Order, 103 FCC 2d 1026-1027 (1986).

* * * * *

(j) A telephone company or group of affiliated telephone companies that participates in an association tariff and elects to file its own tariff pursuant to § 61.50 effective January 1, 1994 shall notify the association not later than September 1, 1993 that it will no longer participate in the association tariff. This January 1, 1994 filing shall be for an 18-month tariff period. A telephone company or group of affiliated telephone companies that participates in an association tariff and elects to file its own tariff pursuant to § 61.50 effective July 1, 1994 or thereafter pursuant to § 69.3(a) shall notify the association not later than December 31 of the preceding year that it will no longer participate in that association tariff.

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation (CC Docket 92-135)

I concur in the Commission's decision today to allow an adjustment for growth in demand when calculating the carrier common line formula for small telephone companies choosing the optional incentive regulation plan.

I dissented on this point in the local telephone company price caps proceeding for the following reason: In its 1990 price caps decision, the FCC adopted a formula for calculating the effect of demand growth on the carrier common line rate element.[1] That formula handed local telephone companies half the benefit of the increase in

[1] *Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order* (Docket No. 87-313), 5 FCC Rcd 6786 (1990), *aff'd sub. nom. National Rural Telecommunications Association v. FCC* (D.C. Cir., March 26, 1993).

minutes of use over non-traffic sensitive subscriber lines, and gave the other half to customers. The majority's rationale, which I could not accept, was that local telephone companies are somehow partially responsible for stimulating interstate demand growth over subscriber lines, and that the telephone companies should benefit from that demand growth through an adjustment to the carrier common line formula.[2] I disagreed with the proposition that local telephone companies in fact are able to stimulate interstate demand growth, and so I dissented from the price cap carrier common line formula.[3]

I concur today, despite my problems with the common line formula, because consistency dictates that the Commission give to smaller telephone companies choosing incentive regulation the same treatment it gave the larger companies.

[2] *Id.*, 5 FCC Rcd at 6793-95.
[3] *Id.*, 5 FCC Rcd at 6859-61.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities

Petitions for Exemption from
Physical Collocation Requirement

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1993; Released: June 9, 1993

By the Acting Chief, Common Carrier Bureau:

TABLE OF CONTENTS

Paragraph No.

I. INTRODUCTION AND BACKGROUND 1
II. PETITIONS BASED ON SPACE LIMITATIONS 4

A. Procedural Issues 4
1. Adequacy of Record 4
2. Inspection of Central Offices 9

B. Reservation of Space for Future Use 11
C. Exemption from Physical and Virtual Collocation Requirements 17
D. Leases 22
E. Physical Collocation at Specific Central Offices 24

III. PETITIONS BASED ON STATE POLICY 28

A. Background 28
B. General Arguments 30
C. Specific State Exemption Policies 34
1. Alabama 34
2. Arkansas 38
3. Indiana 41
4. Maryland 44
5. Missouri 47
6. New Jersey 50
7. North Carolina 53
8. Ohio 56
9. Oklahoma 60
10. Pennsylvania 63
11. West Virginia 68
12. Wisconsin 71

IV. CONCLUSION 74
V. ORDERING CLAUSES 76

Attachment A - List of Commenters
Attachment B - States Claimed By Parties to Have Adopted a Policy Justifying Exemption
Attachment C - Central Offices for Which Parties Seek Exemption on the Basis of Space
Attachment D - Central Offices for Which

I. INTRODUCTION AND BACKGROUND

1. In the *Expanded Interconnection Order*, the Commission adopted rules requiring local exchange carriers (LECs) to offer physical collocation to competitive access providers (CAPs) for the provision of special access.[1] The Commission also permitted LECs to seek exemption from this requirement for specified central offices if they could make a factual showing that a specific central office does not have sufficient space to permit physical collocation.[2] At those central offices, LECs were required to provide virtual collocation.[3]

2. In addition to space-related exemptions, the Commission also stated in the *Expanded Interconnection Order* that it would consider exempting LECs from its physical collocation requirement based on a formal decision by a state legislature or public utility regulatory agency that there should be virtual collocation rather than physical for intrastate collocation, or that it should be left to LECs to choose the form of interconnection to use for intrastate expanded interconnection.[4] The Commission determined that such state policies must be adopted as a final decision after interested parties were permitted a reasonable opportunity to be heard. Finally, the Commission required petitions for exemption to be submitted by February 16, 1993, the date for filing expanded interconnection tariffs.[5]

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*). The Commission defines physical collocation as the physical placement of the interconnecting party's equipment in the LEC's central office. The Commission defines virtual collocation as interconnection adjacent to the LEC central office with economic and technical characteristics comparable to interconnection in the central office. *See* Expanded Interconnection with Local Telephone Company Facilities, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 91-141, 6 FCC Rcd 3259, 3261 (para. 17) (1991) (*Expanded Interconnection Notice*).

[2] *Expanded Interconnection Order*, 7 FCC Rcd at 7390-91 (para. 41), 7407-08 (paras. 77-80), n.190.

[3] *Id.* at 7407-08 (para. 78).

[4] *Expanded Interconnection Order*, 7 FCC Rcd 7390-91 (para. 41).

[5] *Id.* The Commission delegated authority to the Common Carrier Bureau (Bureau) to consider any petitions for exemp-

3. In this Order, we consider petitions for exemption from the Commission's physical collocation requirement filed by eight LECs on the basis of limited space. Seven LECs petitioned for exemption based on state policy grounds for study areas located in a total of thirteen states. Eight parties filed oppositions to these petitions, and eight parties filed replies.[6] For the reasons discussed below, we grant the space-based petitions with respect to 136 central offices and deny the petitions with respect to 25 offices.[7] Furthermore, for reasons discussed below, we find that the actions of five states meet the standards established in the *Expanded Interconnection Order,* and thus warrant our granting an exemption from physical collocation requirements. We deny petitions for exemption based on the actions of the other eight states.

II. PETITIONS BASED ON SPACE LIMITATIONS

A. Procedural Issues

1. Adequacy of Record

4. *Pleadings.* AT&T maintains that some LECs have not made the showing necessary for obtaining a waiver of the Commission's physical collocation requirement based on space limitations.[8] In addition, several commenters assert that affidavits of LECs' employees that insufficient space exists to permit physical collocation should not be considered an adequate factual basis for waiver of the Commission's physical collocation requirement, and that LECs should be required to submit photographs or blueprints of the affected offices.[9]

5. In response, some LECS assert that the applicable standard for an exemption is the "factual showing" required by the *Expanded Interconnection Order* rather than the standard for waiver of a rule of general applicability established in *WAIT Radio.*[10] The LECs argue that the employee affidavits or other information included in their petitions are sufficient to meet the standard of proof required by the *Expanded Interconnection Order.*[11] The LECs also assert that blueprints and future business plans are proprietary, and that making these available would pose potential security risks.[12] US West maintains that gathering blueprints for central offices would be burdensome.[13]

6. Some commenters maintain that the LECs have not adequately described the methodologies they used to determine which central offices lack space for collocation.[14] Teleport also requests that US West submit enough information to enable commenters to determine whether US West has intentionally placed its own equipment to divide contiguous vacant floor space into areas of less than 100 square feet.[15] In response, several LECs have provided such additional information in their replies.[16] BellSouth, in contrast, responds that it adequately explained its methodology in its petition.[17]

7. *Discussion.* The Commission stated in the *Expanded Interconnection Order* that "petitions will be evaluated based on factual showings related to the issue of space availability."[18] Several petitioners assert that the LECs have not made adequate factual showings that would justify exemption from the Commission's physical collocation requirement. Generally, we disagree. In most cases, the LECs provide, either in their petitions or their replies to oppositions, charts specifically listing the central offices for which they seek exemption based on lack of space, the area in square feet in each of those offices, and the amount of area currently occupied by LEC equipment or reserved for future use.[19] In addition, many LECs provide affidavits of employees who have examined the central offices at issue and can testify from personal knowledge that there is insufficient space for physical collocation.[20] We conclude that the information provided by the LECs generally satisfies the Commission's "factual showing" re-

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tion. *Expanded Interconnection Order,* 7 FCC Rcd at 7408 n.191. Issues raised by the expanded interconnection tariff filings themselves are considered in a Companion Order we adopt today. Ameritech Operating Companies, *et. al,* CC Docket No. 93-162, DA 93-657, released June 9, 1993 (*Expanded Interconnection Tariff Order).*

[6] The parties filing pleadings, and the acronyms by which we refer to them, are listed in Appendix A. In Appendix A, we also list the LECs who filed expanded interconnection tariffs but did not seek exemption from the Commission's physical collocation requirement for any central offices. In Appendix B, we list the states in which the LECs seek exemptions based on state policy grounds.

[7] The central offices for which the LECs seek space-based exemptions are listed in Appendix C of this Order. The specific central offices for which we deny space-based petitions for exemption are listed in Appendix D.

[8] AT&T Exemption Opposition at 10-11, *citing* WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio).* Specifically, AT&T refers to GTE and Ameritech.

[9] MFS Exemption Opposition at 4-5; Eastern Telelogic Exemption Opposition at 4; IDA and Ohio Linx Exemption Opposition at 4; Intermedia Exemption Opposition at 3-4, *citing Expanded Interconnection Order,* 7 FCC Rcd at 7408.

[10] Ameritech Exemption Reply at 2; GTE Exemption Reply at 2-3, 24-25.W

[11] Bell Atlantic Exemption Reply at 2-3; Ameritech Exemption Reply at 2-3; Southwestern Bell Tariff Reply at 50; US West Exemption Reply at 2-3.

[12] Bell Atlantic Exemption Reply at 3; Ameritech Exemption Reply at 5; US West Exemption Reply at 6-7; Southwestern Bell Tariff Reply at 50; United and Centel Exemption Reply at 2.

[13] US West Exemption Reply at 6-7. *See also* GTE Exemption Reply at 26-27 (GTE does not keep blueprints, and its floor plans do not reflect use of floor space accurately); United and Centel Exemption Reply at 2 (disclosure of blueprints to public for all central offices would be expensive and could pose a security risk).

[14] AT&T Exemption Opposition at 11; Teleport Exemption Opposition at 6.

[15] Teleport Exemption Opposition at 6-7.

[16] Ameritech Exemption Reply, Att. A; GTE Exemption Reply, Att. 1 and 2; US West Exemption Reply at 2-6 and Att. A.

[17] GTE Exemption Reply at BellSouth Tariff Reply at 40-41.

[18] *Expanded Interconnection Order,* 7 FCC Rcd at 7408 n.190.

[19] *See, e.g.,* Ameritech Exemption Reply at Att. A; Bell Atlantic Exemption Petition at Att. A; BellSouth Space Exemption Petition at Exh. 1; Centel Exemption Petition at Att. A; US West Reply, App. A. In the appendix to US West's reply, it shows that the space in the central offices for which it seeks exemption have little if any vacant floor space that has not been reserved for future use. We determine that US West's appendix is sufficient to show that US West has not "strategically" placed its own equipment in its central offices to frustrate expanded interconnection.

[20] Ameritech Exemption Petition, Exh. H; Centel Exemption Petition, Att.; United Space Exemption Petition at Att. 1 and Att. 2.

quirement. We also find that the LECs have provided adequate descriptions of the methodologies they used to determine which central offices lack space for collocation.

8. We also find that the LECs' submissions are sufficient to make an informed decision regarding exemption requests, and that the submission of photographs or blueprints of central offices is not necessary for this purpose. Furthermore, blueprints or photographs might contain proprietary information or raise security issues. Therefore, submission of this information would not be warranted absent unusual circumstances. Accordingly, we do not place a general requirement on the LECs to submit blueprints or photographs of the central offices for which they seek exemption from the physical collocation requirement.[21]

2. Inspection of Central Offices

9. *Pleadings.* Several commenters request that the Commission develop a procedure for CAPs, Commission personnel, or independent third party engineers to inspect the central offices that LECs claim lack space sufficient to provide collocation.[22] Many commenters are skeptical of certain LECs' claims of insufficient space for physical collocation, given that other LECs did not seek an exemption for any of their central offices.[23] Several LECs assert that nothing in the Communications Act or the *Expanded Interconnection Order* would justify authorizing on-site inspection.[24] Some LECs contend that permitting on-site inspection would lead to "micro-management" of their business practices, and interfere with their ability to provide service to customers other than CAPs.[25] Southwestern Bell and BellSouth argue that conferring inspection rights on the general public would place unreasonable administrative burdens on LECs.[26] GTE and BellSouth maintain that on-site inspection would not be helpful in verifying that the amount of space reserved for future use is reasonable.[27] US West suggests that CAPs with questions regarding specific central offices should either discuss those questions informally with the LECs or file formal or informal complaints with the Commission.[28] Alternatively, United and Centel do not object to third party inspection of a central office after a collocator has applied for collocation at that office.[29]

10. *Discussion.* As stated previously, we find that the evidence in the record is adequate to enable us to reach a determination on the LECs' exemption petitions. For this reason, we conclude it is not necessary at this time to conduct physical inspections of these central offices.

B. Reservation of Space for Future Use

11. *Pleadings.* Many commenters contend that the LECs are overestimating the amount of floor space needed for future use in order to discourage physical collocation. Some commenters request the LECs to provide additional detail on the amount of total floor space used or reserved for future use, or provide more detailed descriptions of their future equipment plans when they seek waivers to reserve central office floor space based on these expansion plans.[30] In addition, Electric Lightwave argues that LECs should be required to rejustify exemptions from the physical collocation requirement on an annual basis, to explain why those LECs have not moved to larger locations or expanded existing locations.[31] Some commenters assert that they cannot compete effectively unless the LECs permit physical collocation.[32] Teleport argues that LECs may overestimate space needed for future growth because advances in technology will probably make some central office equipment smaller, and because some future demand growth will be served by CAP facilities rather than LEC facilities.[33] Teleport requests the Commission to require BellSouth and GTE to provide physical collocation in any central office with more than 1000 square feet of unused floor space.[34] Electric Lightwave contends that LECs should be required to better justify current and future use of space for administrative purposes.[35]

12. Most LECs insist that they have reserved central office space only for current use or reasonably projected future use, and in their replies provide more detail regarding the space available in their central offices, and their plans regarding projected future use of that space.[36] GTE and BellSouth also maintain that requiring physical collocation in any central office with more than 1000 square feet of unused floor space would not place sufficient weight on the LECs' future space needs.[37] US West

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[21] However, there may be specific cases in the future in which blueprints or photographs might provide information useful in resolving issues raised by expanded interconnection at a particular central office. Accordingly, in those specific situations, we may order LECs to submit blueprints or photographs.

[22] Electric Lightwave Exemption Opposition at 2; IDA and Ohio Linx Exemption Opposition at 5; Intermedia Exemption Opposition at 5-6; MFS Exemption Opposition at 5-6; Eastern Telelogic Exemption Opposition at 5.

[23] MFS Exemption Opposition at 6; Teleport Exemption Opposition at 6.

[24] US West Exemption Reply at 7-8; Southwestern Bell Tariff Reply at 49-50; Ameritech Exemption Reply at 4-5. Ameritech also contends that an on-site inspection requirement might be prohibited by the Fourth Amendment to the Constitution. *Id.* at 4-5.

[25] BellSouth Exemption Reply at 40-41; Bell Atlantic Exemption Reply at 3-4; Ameritech Exemption Reply at 5-6.

[26] Southwestern Bell Tariff Reply at 49-50 (Commission can always conduct an audit of space usage); BellSouth Tariff Reply at 41.

[27] GTE Exemption Reply at 27; BellSouth Tariff Reply at 40.

[28] US West Exemption Reply at 3-6.

[29] United and Centel Exemption Reply at 3. *See also* GTE Exemption Reply at 27 (willing to permit Commission staff to inspect central offices).

[30] AT&T Exemption Opposition at 12; IDA and Ohio Linx Opposition at 4; Teleport Exemption Opposition at 4-7; Electric Lightwave Exemption Opposition at 3.

[31] Electric Lightwave Exemption Opposition at 3.

[32] IDA and Ohio Linx Exemption Opposition at 3; Intermedia Exemption Opposition at 3-4; Eastern Telelogic Exemption Opposition at 3-4.

[33] Teleport Exemption Opposition at 1-2.

[34] Teleport Exemption Opposition at 5-6, 8.

[35] Electric Lightwave Exemption Opposition at 3.

[36] Ameritech Exemption Reply, App. A; Bell Atlantic Exemption Reply at 4-5; GTE Exemption Reply at Att. 1, Att. 2; United Space Exemption Petition at Att. 1, Att. 2; US West Exemption Reply at App. A.

[37] BellSouth Tariff Reply at 40-41.

argues that requiring LECs to vacate space currently in use for administrative purposes would raise Constitutional due process issues.[38]

13. Bell Atlantic has reserved up to 400 square feet in some central offices for "unidentified future uses" in addition to space reserved for identified future uses, and argues that space for "unidentified future uses" is necessary to enable Bell Atlantic to meet unscheduled future demand for access services from its own customers without new construction.[39] Many commenters contend that reserving space for "unidentified future use" effectively permits Bell Atlantic to warehouse available floor space, and is therefore unacceptable.[40] Bell Atlantic asserts that it cannot anticipate all its future needs, and that it is reasonable to reserve space in each central office to forestall incurring additional building expense.[41]

14. In assessing whether space is available for collocation, GTE reserved for its own use space sufficient for ten years of anticipated growth.[42] Teleport argues that GTE cannot accurately project the space needed for future growth ten years into the future.[43] GTE replies that a ten year projection is reasonable because central offices have an estimated building life of 30 years, and size of switch rooms is determined based on a ten year switch life. GTE also contends that a ten-year forecasting period is necessary to plan new building construction in crowded urban areas.[44] GTE agrees that a ten-year forecast period may produce unreliable results in forecasting "high tech" communications services, but insists that it is appropriate for "plain old telephone service" (POTS), which serves the needs of the majority of customers. GTE argues that space planning for POTS is a legitimate business exercise in controlling future building costs.[45]

15. *Discussion.* The Commission decided in the *Expanded Interconnection Order* not to require LECs to expand their facilities or relinquish central office space reasonably reserved for future use.[46] Because expanded interconnection is important for the development of competition in the provision of special access services,[47] however, we believe that the Commission did not contemplate granting exemptions based on unreasonable reservations of space for future use. We conclude that Bell Atlantic has not justified an exemption in reserving 400 square feet for "unidentified future uses." Such vague assertions are insufficient to demonstrate that space is unavailable. Therefore, we deny Bell Atlantic's petition for the 13 central offices for which Bell Atlantic seeks exemption based on unidentified future uses.[48]

16. We also find GTE's use of a ten-year forecasting period to be unreasonably long. BellSouth uses a forecasting period of five years, and US West uses a forecasting period of two to three years.[49] We find these periods reasonable. In addition, the Commission expected LECs to take into account interconnector demand for central office space when remodeling or building 1 central offices.[50] It is not reasonable for GTE to preclude physical collocation merely to avoid revising its long-term construction plans. Based on Attachment 2 of GTE's reply, it appears that 12 central offices would be available for physical collocation if GTE used a more reasonable five year forecasting period.[51] Accordingly, we deny GTE's exemption petition with respect to those 12 central offices.[52] Except for Bell Atlantic and GTE, we conclude that the LECs' reservations of space for future use generally appear to be reasonable and are granted.[53]

C. Exemption from Physical and Virtual Collocation Requirements

17. *Pleadings.* Bell Atlantic claims that one central office in Cockeysville, Maryland (the Hunt Valley office) has insufficient space for either physical or virtual collocation, and promises to work with parties to develop

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38 US West Exemption Reply at 11-12.

39 *Id.* at 2-3.

40 AT&T Exemption Opposition at 12-13; MFS Exemption Opposition at 5; Eastern Telelogic Exemption Opposition at 4-5; Teleport Exemption Opposition at 3-4.

41 Bell Atlantic Exemption Reply at 5-6.

42 GTE Space Exemption Petition at 1, 3, GTE Exemption Reply at 21-22. Specifically, in assessing available space, GTE reserved for its own use space sufficient for ten years of anticipated growth for switching equipment; transmission facilities; bridging equipment and channel banks; maintenance consoles, testing, staging areas, and spare equipment; and new platform services such as frame relay, ISDN, and Advanced Intelligent Network. *Id.*

43 Teleport Exemption Opposition at 6.

44 GTE Exemption Reply at 22-23.

45 *Id.* at 24.

46 *Expanded Interconnection Order*, 7 FCC Rcd at 7408 (para. 79).

47 *Expanded Interconnection Order*, 7 FCC Rcd at 7380 (para. 14).

48 *See* Appendix D of this Order.

49 BellSouth Exemption Petition at 4; US West Exemption Petition at 3 n.5. Based on informal discussions between Bureau staff and the LECs, it appears that LECs generally use a forecasting period of approximately five years or less.

50 *Expanded Interconnection Order*, 7 FCC Rcd at 7408 (para. 79).

51 In Attachment 2 of GTE's reply, it specified the offices for which it expected to run out of space in two years, five years and ten years. We grant GTE's exemption requests for offices in which space will be exhausted in two years or five years, and deny requests for offices in which it will take ten years for space to be exhausted.

52 *See* Appendix D of this Order.

53 Teleport suggests that we require LECs to offer physical collocation in areas as small as 25 square feet, rather than permitting LECs to provide physical collocation only in 100 square foot parcels. Teleport Exemption Opposition at 2. US West argues that 25 square feet would not leave sufficient open space for performing maintenance on the collocated facilities, raising occupational safety issues. US West also asserts that Teleport's proposal would make physical collocation available in only three additional central offices in its service region. US West Exemption Reply at 10. This Order considering petitions for exemption from the Commission's physical collocation requirement is not a suitable procedural vehicle for placing new requirements on LECs or conferring new rights on interconnectors. Accordingly, we will not consider this issue further at this time. Similarly, with respect to Electric Lightwave's suggestion to require annual rejustification of exemptions, we do not have an adequate record in this proceeding to determine whether such a rejustification is necessary, or how often LECs should be required to rejustify their exemptions. If space does become available for interconnection in a central office for which we have granted a space exemption, however, the LEC must immediately proceed to offer physical collocation in that office in its tariff.

mutually satisfactory alternative arrangements.[54] Southwestern Bell states that it will be able to provide physical collocation in all locations except one central office in Kansas City, Missouri, where Southwestern Bell leases floor 6 space and transmission facilities from AT&T pursuant to a divestiture agreement.[55] Southwestern Bell explains that it has only transmission equipment, no switching equipment, in this office.[56] Southwestern Bell also maintains that no floor space under its control is available for either physical or virtual collocation.[57] Southwestern Bell plans to vacate AT&T's building by June 1994, and requests exemption from the Commission's physical collocation and virtual collocation requirements.[58] No oppositions were filed against Southwestern Bell's petition. US West asserts that there is insufficient space available to permit either physical collocation or virtual collocation in Pocatello, Idaho, but asserts that physical collocation will be available by October 1994. US West claims that all but one spare conduit and one spare innerduct of the entrance facility has been exhausted, and US West plans to use that capacity itself in 1993.[59]

18. Ameritech claims that three of the 21 central offices for which it seeks exemption lack adequate space for virtual collocation.[60] On May 14, 1993, Ameritech filed a supplement to its petition for exemption. Ameritech asserts that one office in Schaumburg, Illinois, is leased to Ameritech by a cellular provider to use as an interconnection point between the cellular provider and Ameritech's network. Ameritech contends that there is no unused space at this location available for collocation.[61] In the other central office in Schaumburg, Ameritech maintains that there are 26 square feet of empty floor space available, that 14 square feet are reserved for equipment additions within the next two or three years, and the remaining 12 square feet are not contiguous and insufficient to provide virtual collocation.[62] In Belpre, Ohio, Ameritech contends that there are 44 square feet of floor space not currently in use, two equipment additions are planned for this space this year, and planning is under way for a new central office in this area.[63]

19. *Discussion.* The *Expanded Interconnection Order* requires LECs to provide virtual collocation at any location at which physical collocation is not possible.[64] Ameritech, Bell Atlantic, Southwestern Bell, and US West seek exemption from this requirement for one or more central offices. Rules may be waived if there is "good cause" to do so.[65] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[66] We find that these LECs have supported waivers of even virtual collocation in these particular circumstances.

20. Southwestern Bell seeks exemption from the virtual collocation requirement only in one central office in Kansas City, Missouri, where Southwestern Bell leases floor space and transmission facilities from AT&T pursuant to a divestiture agreement, has no control over the rest of the building, and plans to vacate the building by June 1994.[67] Southwestern Bell will provide physical collocation at the rest of its central offices in Kansas City. US West has explained that all but one spare conduit and one spare innerduct of the entrance facility has been exhausted in a central office in Pocatello, Idaho, and that it plans to use this space itself.[68] US West will provide physical collocation in Idaho Falls and Boise, Idaho.[69] Bell Atlantic has stated that most of the space in its building in its Hunt Valley central office in Cockeysville, Maryland, is used for administrative rather than central office uses, and that all its central office space is currently in use.[70] Bell Atlantic will provide physical collocation at another central office in Cockeysville, and at several other locations in or near Baltimore.[71]

21. Ameritech states that all or practically all the space in its three central offices is in use, and that it plans to build a new central office in the Belpre area. Ameritech will provide virtual collocation at two other central offices in Schaumburg, and will provide physical collocation at offices in Arlington Heights, Lombard, and at several other locations in or near Chicago.[72] Thus, these LECs have provided good cause for waiver of the virtual collocation requirement. Accordingly, we grant US West's request for waiver of the Commission's virtual collocation requirement at its Pocatello office, and we grant waivers to Ameritech, Bell Atlantic, and Southwestern Bell for the central offices discussed above on our own motion.[73]

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[54] Bell Atlantic Exemption Petition at 3-4.
[55] Southwestern Bell Space Exemption Petition at 1-2.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 2.
[59] US West Exemption Petition at 2-4 (seeking a waiver of Section 64.1401 of the Commission's Rules, 47 C.F.R. § 64.1401, through October 1, 1994). "Innerduct" is the space in which technicians work while pulling cable through entrance facilities.
[60] Ameritech Exemption Petition at 5-7.
[61] Ameritech Supplement at 1.
[62] *Id.* at 1-2.
[63] *Id.* at 2.
[64] *Expanded Interconnection Order*, 7 FCC Rcd at 7407 (para. 77).
[65] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.
[66] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[67] Southwestern Bell Space Exemption Petition at 1-2.
[68] US West Exemption Petition at 4.
[69] Submission of US West, March 17, 1993, pursuant to Bureau data request of March 12, 1993.
[70] Bell Atlantic Exemption Petition, Att. A at A-9.E
[71] Submission of Bell Atlantic, March 17, 1993, pursuant to Bureau data request of March 12, 1993.
[72] Submission of Ameritech, March 17, 1993, pursuant to Bureau data request of March 12, 1993. MFS informally told the Bureau's staff that it has no plans to seek collocation at either Schaumburg office or the Belpre office for which Ameritech seeks exemption from the Commission's virtual collocation requirement.
[73] While US West seeks waiver of the virtual collocation requirement only until October 1, 1994, and Southwestern Bell seeks exemption only until June 1994, Ameritech and Bell Atlantic have not placed any time limitation on their exemption requests. We conclude that such a limitation would be in the public interest, and therefore grant Ameritech waiver of the virtual collocation requirement at its Belpre central office only until October 1, 1994. Similarly, we grant Bell Atlantic waiver of the Commission's virtual collocation requirement at its Hunt Valley location only until October 1, 1994. By this time, we expect Ameritech and Bell Atlantic to expand these central offices sufficiently to permit virtual collocation. If either

D. Leases

22. *Pleadings.* Ameritech and Bell Atlantic have each sought exemption from the physical collocation requirement for three central offices, because they lease these facilities from third parties. They indicate that physical collocation might conflict with leasing agreements.[74] Teleport and MFS argue that Ameritech and Bell Atlantic should be required to identify any lease or contract provisions that they allege prohibits physical collocation.[75]

23. *Discussion.* Ameritech and Bell Atlantic have established an independent basis for exemption at these six central offices -- insufficient space. In addition, Ameritech has shown that its Brookpark, Ohio central office warrants exemption from the physical collocation requirement due to the expanded interconnection policy of Ohio.[76] Therefore, we need not consider in this Order whether the leasing agreements in these central offices are sufficient justification for exemptions, or what evidence a LEC must submit to the Commission to support such a petition. The general issues raised by offering expanded interconnection in leased central office space are discussed in the Companion Order considering issues raised by the expanded interconnection tariff filings.

E. Physical Collocation at Specific Central Offices

24. *Background.* Ameritech asserts that there is insufficient space to provide physical collocation in 21 of the 268 central offices which are subject to the Commission's collocation tariffing requirement. According to Ameritech, most of these offices are not located in the "core business areas," and no offices in the business districts of major cities are included in the 21 exemption requests.[77] Bell Atlantic seeks exemption from the physical collocation requirement in 49 of 169 central offices due to lack of space.[78] BellSouth examined each of its central offices by identifying the total square footage of each office, and subtracting the following: (1) footage unavailable for collocation (such as hallways and staircases); (2) space currently occupied by BellSouth equipment; (3) space reserved by BellSouth to accommodate expected growth for the next five years; and (4) space unsuitable for collocation (*e.g.*, basements subject to flooding). Based on these considerations, BellSouth concludes that 28 of 141 central offices do not have sufficient space for physical collocation, although it seeks exemption based on state policy rather than space availability for nine of these locations.[79] Centel claims it lacks sufficient space to provide physical collocation in Tallahassee and Fort Walton P Beach, Florida, and Las Vegas, Nevada.[80] Centel contends that there are 92,537 total square feet of floor space in nine central offices in Las Vegas, and Centel is currently using all of it for its own operations.[81] Centel also maintains that five of ten central offices in Tallahassee and Fort Walton Beach, Florida, have no space available for physical collocation.[82]

25. *Pleadings.* Several interconnectors assert they cannot compete effectively against a LEC unless that LEC provides physical collocation at a particular central office.[83] Teleport notes that Bell Atlantic and GTE have sought exemption for a higher proportion of their central offices than other LECs, and suggests that these LECs may have targeted their requests for exemption to prevent competition in particular areas.[84] Ameritech observes that most of its requests for exemption are for central offices in rural areas.[85] Bell Atlantic notes that its requests for exemption do not include its central offices where its equipment needs are growing fastest.[86]

26. *Discussion.* We determined above that the LECs in general have provided factual showings adequate to support their requests for exemption from the Commission's physical collocation requirement. The LECs generally provide, either in their petitions or their replies to oppositions, charts specifically listing the central offices for

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Ameritech or Bell Atlantic is unable to do so, they may seek another waiver of the Commission's virtual collocation requirement at that time.

[74] Ameritech Exemption Petition at 8; Bell Atlantic Exemption Petition at 3; Bell Atlantic Exemption Reply at 5 n.15. Specifically, the Ameritech central offices at issue are the Brookpark, Ohio, and the two Schaumburg central offices which are the subject of Ameritech's virtual collocation waiver request discussed above. Bell Atlantic refers to three central offices located within the private property of the FBI, the Pentagon, and the Pittsburgh International Airport. *See also* Defense Comments at 1-2 (requesting the Commission to exempt Bell Atlantic from its physical collocation obligation at the Pentagon central office).

[75] Teleport Exemption Opposition at 5; MFS Exemption Opposition at 6-7. MFS would accept statements of Bell Atlantic's landlord similar to that provided by the Department of Defense as adequate proof. *Id.* at 7 n.10. In general, US West opposes public disclosure of leasing agreements because it considers these agreements proprietary. US West Exemption Reply at 12-13.

[76] *See* Section III.C.8. of this Order, *infra*.

[77] Ameritech Exemption Reply at 3.

[78] Bell Atlantic Exemption Petition at 2.

[79] BellSouth Space Exemption Petition at 4-5 and n.10; BellSouth Tariff Reply at 38-40. BellSouth originally requested exemption for 20 central offices on space availability grounds, assuming that, to provide physical collocation, a central office must contain a minimum of 300 square feet of contiguous space (excluding areas in use or planned for future use), assuming that each central office providing expanded interconnection must accommodate a minimum of three interconnectors. BellSouth Exemption Petition at 3-4. Several commenters argued that this assumption is inconsistent with the "first-come, first-served" requirement of the *Expanded Interconnection Order*. Teleport Exemption Opposition at 7-8; MFS Exemption Opposition at 5 n.8; Intermedia Exemption Opposition at 4-5; AT&T Exemption Opposition at 13-14, *citing Expanded Interconnection Order*, 7 FCC Rcd at 7407. In response, BellSouth revised its request for exemption to include only central offices with less than 100 square feet of floor space. BellSouth asserts that this revision affects only one central office in Austell, Georgia, which will now be available for physical collocation. BellSouth Tariff Reply at 38-40.

[80] Centel Exemption Petition at 1-2.

[81] *Id.* at Att. (Aff. of Robert T. Flood).

[82] *Id.* at Att. (Aff. of David H. Farmer).

[83] Ohio Linx and IDA Exemption Opposition at 3 (Evansville, Indiana, and Brookpark, Cuyahoga Falls, Dublin, and Toledo in Ohio); Eastern Telelogic Exemption Opposition at 3-4 (Paoli, King of Prussia, and Wayne, Pennsylvania); Intermedia Exemption Opposition at 3-4 (Jacksonville, Tallahassee, Feathersound, Westside, and Ybor City in Florida).

[84] Teleport Exemption Opposition at 4. *See also* Eastern Telelogic Exemption Opposition at 3-4.

[85] Ameritech Exemption Reply at 3-4 and Att. A.

[86] Bell Atlantic Exemption Reply at 5.

which they seek exemption based on lack of space, the area in square feet in each of those offices, and the amount of area currently occupied by LEC equipment or reserved for future use.[87] In addition, many LECs provide affidavits of employees who have examined the central offices at issue and can testify from personal knowledge that there is insufficient space for physical collocation.[88] The commenters do not provide evidence that would lead us to reconsider this conclusion at the central offices they cite.[89]

27. We also determined above that Bell Atlantic and GTE did not adequately support their petitions for exemption at a total of 13 and 12 central offices, respectively.[90] With these denials, the proportions of central offices for which Bell Atlantic and GTE seek exemption are similar to the proportions of central offices for which other LECs seek exemption. Furthermore, the Bell Atlantic and GTE offices which are granted exemption are either in rural areas, or are close to other central offices where physical collocation will be provided. Therefore, we conclude that Teleport has not shown that either Bell Atlantic or GTE has targeted its request for exemption to prevent competition in particular areas.

III. PETITIONS BASED ON STATE POLICY

A. Background

28. The *Expanded Interconnection Order* states that LECs will be granted exemption from the Commission's physical collocation requirement only in deference to state policies favoring virtual collocation for intrastate collocation, or for state policies allowing LECs to choose which form of intrastate collocation to offer. The Commission determined that such state policies must be adopted in final decisions reached after interested parties were permitted a reasonable opportunity to be heard. Finally, the Commission required LEC petitions for exemption to be submitted by February 16, 1993, the date for filing expanded interconnection tariffs.[91]

29. For reasons discussed below, we hereby grant petitions for exemption based on the state collocation policies of Arkansas, Indiana, Maryland, Ohio, and Wisconsin. However, if any of these decisions are overturned on appeal, or are revised on reconsideration, we may reconsider our decision to grant petitions for exemption based on that state's policy. We deny petitions for exemption based on the collocation policies of other states because they fail to fall within the Commission's exemption criteria.[92]

B. General Arguments

30. *Pleadings.* According to MFS, the Commission decided to consider petitions for exemption based on state policy to permit states in the process of developing a policy on intrastate collocation to finish those proceedings, rather than to invite state public service commissions to initiate and complete collocation proceedings within three months.[93] Some parties assert that, because the state commissions adopted their policies on an expedited basis, they could not have adequately considered all the complex issues raised by intrastate collocation, and therefore their decisions should not serve as a basis for exemption.[94] Ohio PUC notes that MFS cites no language from the *Expanded Interconnection Order* to support its interpretation, and that the Ohio PUC considered all relevant issues thoroughly in its collocation proceeding.[95] A number of LECs reply that, because the Commission established a short deadline, it must have intended the states to adopt their collocation policies on an expedited basis.[96] Several parties also argue that it would be inappropriate for the Commission now to reverse its decision to grant exemptions based on state policy after several states have expended resources to develop those policies.[97]

31. Teleport, IDA and Ohio Linx note that the state commissions of Alabama and Indiana have established a requirement that expanded interconnection arrangements result from good faith negotiations between LECs and interconnectors.[98] A number of commenters also observe that the state commissions in Ohio and West Virginia require LECs to obtain prior state commission approval for interconnection arrangements.[99] MFS notes that several state commissions have expressly retained jurisdiction

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[87] *See, e.g.*, Ameritech Exemption Reply at Att. A; Bell Atlantic Exemption Petition at Att. A; BellSouth Space Exemption Petition at Exh. 1; Centel Exemption Petition at Att. A.

[88] *See, e.g.*, Ameritech Exemption Petition, Exh. H; Centel Exemption Petition, Att.

[89] In addition, with respect to the specific central offices in Indiana and Ohio referred to by Ohio Linx and IDA, we determine below that those states have adopted intrastate expanded interconnection policies which meet the Commission's criteria for exemption. *See* Sections III.C.3 and III.C.8., *infra*.

[90] *See* Appendix D.

[91] *Expanded Interconnection Order*, 7 FCC Rcd at 7391 (para. 41).

[92] On April 16, 1993, Bell Atlantic filed a "Supplement" to its petition for exemption, alleging that the Public Service Commission of the District of Columbia (DCPSC) adopted a policy giving LECs a choice of whether to provide physical or virtual collocation at each central office. Bell Atlantic also submitted a copy of the DCPSC's opinion, which was adopted on April 8, 1993. However, Bell Atlantic does not seek exemption from the Commission's physical collocation requirement for any central offices in the District of Columbia on the basis of the DCPSC's opinion, but states that it "will evaluate future collocation requests in the District of Columbia based upon the findings established therein." Bell Atlantic Supplemental Filing at 2. Because Bell Atlantic does not appear to be requesting an exemption based on the DCPSC's decision, we decline to comment on this decision further.

[93] MFS Exemption Opposition at 11-12. MFS cites Illinois, New York, and Texas as examples of such states.

[94] MFS Exemption Opposition at 12-13; IDA and Ohio Linx Exemption Opposition at 6-7.

[95] Ohio PUC Reply at 5-7.

[96] GTE Exemption Reply at 4-5; Ameritech Exemption Reply at 7; Bell Atlantic Exemption Reply at 9-10. GTE also argues that the short deadline would justify a lenient interpretation of the *Expanded Interconnection Order* rather than the imposition of new standards. GTE Exemption Reply at 11.

[97] GTE Exemption Reply at 4-5; Ameritech Exemption Reply at 8; Ohio PUC Reply at 5-6.

[98] Teleport Exemption Opposition at 9-10; IDA and Ohio Linx Exemption Opposition at 7.

[99] IDA and Ohio Linx Exemption Opposition at 7; AT&T Exemption Opposition at 8-10; MFS Exemption Opposition at 10-11.

to consider complaints involving collocation issues.[100] MFS asserts that these policies amount to an "ad hoc" review process rather than a policy favoring virtual collocation or LEC choice contemplated by the Commission in the *Expanded Interconnection Order*. Ameritech asserts that the state commissions have clearly articulated a collocation policy, and that this clear policy is not made less clear by their "ad hoc" review of collocation arrangements.[101] GTE and Bell Atlantic argue that it is reasonable for state commissions to consider complaints, and that there is nothing in the *Expanded Interconnection Order* which would prohibit such complaints.[102] GTE observes that the Commission contemplated negotiations on the terms of virtual collocation in the *Expanded Interconnection Order*.[103]

32. *Discussion.* In the *Expanded Interconnection Order*, the Commission stated that it would consider exempting from its physical collocation requirement central offices in study areas located in states that have adopted a policy favoring virtual collocation for intrastate expanded interconnection, or allowing LECs to choose what form of collocation to use for intrastate expanded interconnection.[104] We disagree with the commenters who assert that petitions for exemption should be denied simply because the competent regulatory authority adopted its intrastate collocation policy on an expedited basis. The *Expanded Interconnection Order* stated that it would consider petitions for exemption in study areas where the public utility regulatory agencies adopted a formal decision after allowing all interested parties a reasonable opportunity to be P heard.[105] There is no evidence in the record that any interested party was denied an opportunity to be heard in any of the proceedings simply because they were adopted on an expedited basis.

33. We also conclude that none of the elements of state collocation policies characterized by commenters as "ad hoc" procedures by themselves warrant denials of petitions for exemption. The "ad hoc" procedures discussed by the commenters, such as requiring good faith negotiations regarding collocation arrangements, requiring LECs to obtain prior approval of collocation arrangements from the state PSC, and retaining jurisdiction to consider complaints do not interfere with the Commission's expanded interconnection policy. Accordingly, we find that these issues raised by the commenters do not warrant denials of any petitions for exemption.

C. Specific State Exemption Policies

1. Alabama

34. *Background.* On February 16, 1993, the Alabama Public Service Commission (Alabama PSC) established a policy permitting LECs in Alabama to offer either physical or virtual collocation "pursuant to negotiated agreement between the parties."[106] The Alabama PSC does not establish a schedule for filing interconnection tariffs, and it does not state whether virtual arrangements are now available.

35. *Pleadings.* BellSouth and GTE assert that the Alabama PSC has established a policy permitting LECs to choose whether to offer physical or virtual collocation.[107] BellSouth and GTE argue generally that the Alabama PSC's decision is a final formal order expressing a state policy favoring virtual collocation or LEC choice, and thus is within the standards established for state policy-based exemption established in the *Expanded Interconnection Order*.[108] MFS contends that the Alabama PSC's policy permits rather than requires LECs to offer collocation, and so does not meet the Commission's standards for exemption.[109] Furthermore, MFS alleges that the Alabama PSC did not adequately explain its reasons for adopting its policy, and therefore its decision should not be used as a basis for exemption.[110]

36. *Discussion.* We deny BellSouth's and GTE's petitions for exemption for their central offices in Alabama. The Alabama PSC's order does not explicitly require LECs within its jurisdiction to provide collocation for intrastate special access. Rather, it appears that LECs in Alabama are permitted to choose whether to provide intrastate collocation at all, in addition to being permitted to choose whether to provide physical or virtual collocation wherever they make expanded interconnection available. The Commission decided to consider petitions for exemption only in study areas where the regulatory authority has adopted an order favoring virtual collocation for intrastate expanded interconnection, or allowing LECs to choose which form of collocation to offer in the intrastate jurisdiction.[111] The Commission stated that "[w]e are allowing this limited exemption to accommodate the states to the extent possible, consistent with our federal policy in favor of physical collocation."[112] Thus, this exemption was intended to permit LECs to coordinate their interstate and intrastate collocation architecture. In states where there is no right to intrastate collocation estab-

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[100] MFS Exemption Opposition at 11-12. MFS refers to Alabama, Indiana, Maryland, Ohio, Pennsylvania, West Virginia, and Wisconsin.

[101] Ameritech Exemption Reply at 8. *See also* Ohio PUC Reply at 3-4.

[102] GTE Exemption Reply at 11-12; Bell Atlantic Exemption Reply at 9. *See also* Ohio PUC Reply at 4, 7 (Ohio PUC required by statute to review transactions between utilities or transactions between utilities and their customers, and to consider properly filed complaints).

[103] GTE Exemption Reply at 12-13. With respect to West Virginia, Bell Atlantic asserts that MFS misinterprets the West Virginia PSC's decision, and that it requires prior approval of negotiated collocation arrangements, not all collocation arrangements. Bell Atlantic Exemption Petition at 8.

[104] *Expanded Interconnection Order*, 7 FCC Rcd 7390-91 (para. 41).

[105] *Expanded Interconnection Order*, 7 FCC Rcd at 7391 (para. 41).

[106] Alabama Public Service Commission, Notice of Inquiry on Expanded Interconnection for Interstate Special Access, Order, Informal Docket U-3449 (released Feb. 16, 1993). *See* GTE State Exemption Petition, Attachment A, at 2; BellSouth State Exemption Petition, Exh. 2, at 2.

[107] BellSouth State Exemption Petition at 2; GTE State Exemption Petition at 1-2.

[108] BellSouth Tariff Reply at 41-42; GTE Exemption Reply at 11-13.

[109] MFS Exemption Opposition at 8-9.

[110] MFS Exemption Opposition at 14.

[111] *Expanded Interconnection Order*, 7 FCC Rcd at 7391 (para. 41).

[112] *Expanded Interconnection Order*, 7 FCC Rcd at 7391 (para. 41).

lished for interconnectors, it is not necessary to coordinate interstate and intrastate expanded interconnection architectures, and thus exemptions are not necessary.

37. Furthermore, the Commission found in the *Expanded Interconnection Order* that expanded interconnection would foster the development of competition in the provision of special access services.[113] The Commission also determined that competition for special access services would provide an important incentive for LECs to become more efficient, deploy new technologies, and be more responsive to customers in providing existing services.[114] In addition, the Commission concluded that competition would tend to reduce prices for special access services.[115] There is nothing in the *Expanded Interconnection Order* contemplating exemptions in study areas where LECs would be permitted to refuse to provide intrastate expanded interconnection at all, thus denying their customers the benefits of competition for the provision of special access services. For these reasons, the Alabama Order does not meet the Commission's criteria for exemption on the basis of a state policy, and accordingly, the petitions of BellSouth and GTE are denied for their central offices in Alabama.

2. Arkansas

38. *Background.* On February 12, 1993, the Arkansas Public Service Commission (Arkansas PSC) adopted a rule providing LECs with the option of providing either physical collocation, virtual collocation, or both.[116] The Arkansas PSC also found that LECs and interconnectors should be free to negotiate mutually satisfactory expanded interconnection arrangements on an individual office-by-office basis, and gave to either party recourse to the Arkansas PSC if a party believes the other party is not negotiating in good faith.[117] The rule adopted by the Arkansas PSC states "All tier 1 local exchange carriers mandated to implement an expanded interconnection plan for special access shall include, on an interconnector specific basis, at the option of the local exchange carrier involved, provision for either physical collocation or virtual collocation, or both." The Arkansas PSC does not establish any intrastate implementation date.

39. *Pleadings.* GTE and Southwestern Bell maintain that the Arkansas PSC has adopted a policy justifying exemption from the Commission's physical collocation requirement.[118] MFS asserts that the Arkansas policy could result in virtual collocation for some interconnectors and physical collocation for others at the same central office at the LEC's discretion. MFS maintains that this is discriminatory, and therefore should be rejected as a basis for exemption.[119] Furthermore, MFS alleges that the Arkansas PSC did not adequately explain its reasons for adopting its policy, and therefore its decision should not be used as a basis for exemption.[120] Southwestern Bell replies that the Arkansas PSC's decision is a final, formal order as contemplated by the *Expanded Interconnection Order*.[121] GTE denies that the Arkansas PSC's decision requires interconnector-specific arrangements, but asserts that such arrangements would not be inconsistent with the *Expanded Interconnection Order*.[122]

40. *Discussion.* On May 14, 1993, the Bureau submitted a request for clarification of the Arkansas PSC's Order to the Arkansas PSC. In its letter dated May 21, the Arkansas PSC explained that it considers a LEC to be "mandated" within the meaning of its expanded interconnection rule, to provide expanded interconnection whenever an interconnector requests collocation at a specific central office.[123] Based on the Arkansas PSC's clarification, we conclude that Arkansas's expanded interconnection policy provides GTE and Southwestern Bell a sufficient basis for exemption from the Commission's physical collocation requirement.[124]

3. Indiana

41. *Background.* On February 12, 1993, the Indiana Utility Regulatory Commission (Indiana URC) decided that LECs should be allowed the option of providing physical or virtual collocation, and that LECs and interconnectors should be allowed to negotiate mutually acceptable collocation arrangements on an individual office-by-office basis.[125] Indiana requires physical connection whenever "the public convenience and necessity requires such physical connection(s) and such connection(s) will not result in irreparable injury to the owner or other users of the facilities."[126] Indiana URC also adopted the minimum standards for virtual and physical collocation

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113 *Expanded Interconnection Order*, 7 FCC Rcd at 7380 (para. 14).

114 *Id.*

115 *Id.*

116 In the Matter of the Application for a Rule Limiting Collocation for Special Access to Virtual or Physical Collocation at the Option of the Local Exchange Carrier, Arkansas PSC, Docket No. 92-337-R, Order No. 4, at Attachment A page three (adopted Feb. 11, 1993). *See* GTE State Exemption Petition, Att. B; Southwestern Bell State Exemption at Att; Letter from Arkansas PSC to Secretary, FCC, Feb. 19, 1993.

117 GTE State Exemption Petition, Att. B at 10-13.

118 Southwestern Bell State Exemption Petition at 1-2; GTE State Exemption Petition at 1-2.

119 MFS Exemption Opposition at 11.

120 MFS Exemption Opposition at 14.

121 Southwestern Bell Tariff Reply at 50-51.

122 GTE Exemption Reply at 15-16.

123 Letter from Chairman Sam I. Bratton, Jr., Commissioner Patricia S. Qualls, and Commissioner Julius D. Kearney, Arkansas PSC to Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, May 21, 1993.

124 On May 7, 1993, Southwestern Bell filed an appeal of the Arkansas PSC's Order with the Arkansas PSC. If the Arkansas PSC's Order is vacated by a court decision, or in the unlikely event that the Arkansas PSC implements its collocation policy in a manner that is inconsistent with the goals of the Commission's *Expanded Interconnection Order*, we will reexamine our grant of petitions for exemption based on the Arkansas PSC's implementation of its policy.

125 In the Matter of the Investigation on the Commission's Own Motion into Expanded Interconnection with Local Telephone Company Facilities (Collocation) Pursuant to a Report and Order and Notice of Proposed Rulemaking Issued by the Federal Communications Commission on October 19, 1992 in CC Docket No. 91-141, Indiana URC, Cause No. 39618 (approved Feb. 12, 1993). *See* GTE State Exemption Petition, Att. C at 25-27; Ameritech Exemption Petition, Exh. A at 25-27; United State Exemption Petition, Exh. 1 at 25-27.

126 Indiana Code 8-1-2-5, *cited in* GTE State Exemption Petition, App. C at 24.

arrangements established in Sections 64.1401(e) and (f) of the Commission's Rules.[127] LECs were required to file interconnection tariffs.[128]

42. *Pleadings.* GTE, Ameritech, and United assert that the Indiana URC has adopted a policy permitting LECs to choose whether to offer physical or virtual collocation.[129] The oppositions focusing on Indiana URC's collocation policy are summarized in Section III.B. of this Order, *supra.*

43. *Discussion.* We find that the collocation policy of the Indiana URC does meet the Commission's guidelines for grant of an exemption from the Commission's physical collocation requirement. The governing Indiana statute requires physical connection whenever it is required by "the public convenience and necessity." The Indiana URC also adopted the Commission's minimum standards for virtual and physical collocation arrangements. Finally, the Indiana URC stated that "The LECs should file uniform tariffs for intrastate virtual and physical collocation offerings within 30 days of this Order [which] should become effective upon review and approval of the Engineering Division of the Commission."[130] The Indiana Order also concluded that "Customer specific negotiated rates between the LEC and interconnector should be filed by the LEC as a 30-day filing in tariff form."[131] These facts demonstrate that Indiana's policy meets the Commission's guidelines. Therefore, we grant the petitions for exemption of Ameritech, GTE, and United for central offices in Indiana.[132]

4. Maryland

44. *Background.* On February 11, 1993, the Maryland Public Service Commission (Maryland PSC) adopted a policy allowing LECs to choose the form of interconnection to use for intrastate expanded interconnection, to help ensure that LECs in Maryland have adequate space in their central offices to provide local service in the future.[133] Maryland did not expressly state whether it was permitting or requiring collocation, but observed that Bell Atlantic offers physical collocation under tariff at the majority of its central offices.[134] The Maryland PSC also stated it would "entertain any complaint filed by an intrastate interconnector that the LEC unreasonably denied its request for physical collocation."[135]

45. *Pleadings.* Bell Atlantic claims that the Maryland PSC has adopted a formal policy decision permitting LECs to choose whether to offer physical or virtual collocation.[136] Oppositions focusing on Maryland PSC's collocation policy are summarized in Section III.B. of this Order, *supra.*

46. *Discussion.* We find the Maryland PSC's Decision does not unambiguously meet one criterion for granting a state exemption from the physical collocation requirement. On one hand, nowhere in the Decision does the Maryland PSC specifically require LECs to provide intrastate expanded interconnection. On the other hand, the Maryland PSC states that it will consider complaints filed by intrastate interconnectors that the LEC "unreasonably denied" a request for physical collocation.[137] This latter pronouncement would seem irrelevant if the state did not require interconnection for intrastate special access service. Furthermore, we note that Bell Atlantic already offers physical collocation at 20 of 29 central offices in Maryland, and that the Maryland PSC has met all other criteria for obtaining a state exemption. In addition, we concluded above that Bell Atlantic provided sufficient justification for exemption based on space limitations for all but two of the central offices in Maryland for which it requested space-based exemptions. Under these circumstances, we will grant Bell Atlantic exemption from the Commission's physical collocation requirement on a temporary basis, pending clarification from the Maryland PSC.[138]

5. Missouri

47. *Background.* Effective February 10, 1993, the Missouri Public Service Commission (Missouri PSC) adopted an "Emergency Amendment" to its rules which permits LECs within its jurisdiction to choose whether to offer physical or virtual collocation.[139] This "Emergency

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[127] *Id.* at 26-27, *citing* Sections 64.1401(d) and (e) of the Commission's Rules, 47 C.F.R § 64.1401(d), (e). For physical arrangements, LECs are required to permit interconnectors to place their equipment within or upon the LECs' central office buildings, to use this equipment with LEC facilities to provide basic telephone service, to enter the LEC's buildings to perform maintenance and repairs, and to obtain reasonable amounts of space. For virtual arrangements, LECs were required to permit interconnectors to specify equipment needed to terminate basic transmission facilities, to use such equipment to interconnect with the LEC's equipment, and to monitor and control such equipment.

[128] *Id.* at 27.

[129] Ameritech Exemption Petition at 3; GTE State Exemption Petition at 1-2; United State Exemption Petition at 1; Ameritech Exemption Reply at 8.

[130] GTE Exemption Petition, App. C at 27.

[131] *Id.*

[132] In the unlikely event that the Indiana URC implements its collocation policy in a manner that is inconsistent with the goals of the Commission's *Expanded Interconnection Order,* we will reexamine our grant of petitions for exemption based on the Indiana URC's implementation of its policy.

[133] In the Matter of the Petition of the Chesapeake and Potomac Telephone Company of Maryland for Commission Adoption of a Formal Decision in Favor of Allowing Local Exchange Carriers to Choose the Form of Interconnection to Use for Intrastate Expanded Interconnection, Maryland PSC, Order No. 70357, Case No. 8533, at 4-5 (adopted Feb. 11, 1993). *See* Bell Atlantic Exemption Petition at Att. B.

[134] *Id.* at 4.

[135] *Id.* at 5.

[136] Bell Atlantic Exemption Petition at 4. Bell Atlantic does not request exemption from the Commission's physical collocation requirement on the basis of the Maryland PSC's decision, but plans to if the Commission denies Bell Atlantic's space-based petition with respect to any central offices in Maryland. *Id.* at 4-5. We denied Bell Atlantic's space-based petition for two central offices in Maryland. *See* Appendix D.

[137] *Id.* at 5.

[138] Bell Atlantic is granted exemption from the Commission's physical collocation requirement for its central offices in Maryland for 60 days following the release date of this Order. We will by letter request the Maryland PSC to provide clarification within 30 days of the release date of this Order. If it prefers, the Maryland PSC may provide this clarification in the form of a letter similar to that provided by the Arkansas PSC. *See* Section III.B.2. of this Order, *supra.*

[139] 18 Missouri Register 140 (Jan.19, 1993). *See* United State Exemption Petition at Exh. 2; Southwestern Bell State Exemption Petition at 2 n.1 and Att. *See also* GTE State Exemption Petition at Att. D.

Amendment" expires June 9, 1993.[140] The Missouri PSC also solicited comments in support of or in opposition to adopting this rule on a permanent basis.[141] Missouri PSC does not discuss in its "Emergency Rule" whether negotiations would be permitted or required, whether tariffs would be permitted or required, or whether collocation for intrastate special access services would be permitted or required in Missouri. On February 19, 1993, Missouri PSC substantially revised its rule, and solicited further comment on the revised rule.[142]

48. *Pleadings.* GTE, Southwestern Bell, and United maintain the Missouri PSC has adopted a policy justifying exemption from the Commission's physical collocation requirement.[143] AT&T and Teleport argue that the Missouri PSC's emergency rule does not comply with the Commission's criteria for exemption because there appears to have been no public participation involved in enacting this rule.[144] MFS contends that the Missouri PSC's policy, permitting but not requiring LECs to offer collocation for intrastate special access services, does not meet the Commission's standards for exemption from its physical collocation requirement.[145] MFS contends that this is not a "final order" because the Missouri PSC decided to delay resolution of some issues to a future proceeding.[146] Furthermore, MFS alleges that the Missouri PSC did not adequately explain its reasons for adopting its policy, and therefore its decision should not be used as a basis for exemption.[147] Southwestern Bell and GTE assert that the emergency rule is a final decision as contemplated by the *Expanded Interconnection Order*.[148]

49. *Discussion.* There is no evidence that interested parties were given an opportunity to comment prior to the adoption of the Missouri PSC's Emergency Rule. Furthermore, because the Missouri PSC sought comment on whether to adopt the Emergency Rule on a permanent basis, the Rule does not appear to be considered final. Finally, the Missouri PSC's rule does not appear to establish a right to intrastate expanded interconnection. We conclude that the Missouri Emergency Rule does not meet the Commission's criteria for granting exemptions from physical collocation based on state policy grounds. Accordingly, the petitions for exemption filed by GTE, Southwestern Bell, and United are denied for their Missouri central offices.

6. New Jersey

50. *Background.* On February 11, 1993, the New Jersey Board of Regulatory Commissioners (New Jersey BRC) concluded that a policy favoring physical collocation is preferable, provided that there is compliance with local zoning ordinances, there is adequate space for physical collocation, the safety and adequacy of local service is not jeopardized, fire and other safety considerations are not adversely affected, and physical collocation is made available on a non-discriminatory basis.[149]

51. *Pleadings.* Bell Atlantic observes that the New Jersey BRC has adopted a formal policy decision favoring physical collocation, but under certain conditions which Bell Atlantic believes warrant exemption from the Commission's physical collocation requirement.[150] MFS and Eastern Telelogic contend that the New Jersey BRC's policy favors physical collocation and therefore cannot be used to justify exemption from the Commission's physical collocation requirement.[151] Bell Atlantic replies that, by establishing several factors in addition to space considerations which must be met when providing physical collocation, the New Jersey BRC has in effect established a policy favoring virtual collocation.[152]

52. *Discussion.* The New Jersey BRC's policy explicitly favors physical collocation for intrastate special access services. The conditions placed on physical collocation by the New Jersey BRC are not dramatically different from, or more onerous than, the Commission's requirements for physical collocation. We cannot agree with Bell Atlantic's contention that placing these additional requirements on physical collocation is in fact an expression of preference for virtual collocation. Therefore, we deny Bell Atlantic's petition for exemption to the extent it is based on the New Jersey BRC's collocation policy.

7. North Carolina

53. *Background.* On February 10, 1993, the North Carolina Utilities Commission (North Carolina UC) established a policy permitting LECs in North Carolina to offer either physical or virtual collocation for intrastate special access services.[153] However, North Carolina statute currently prohibits competition by CAPs. Therefore, the North Carolina UC stated its policy would be applicable if

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[140] United State Exemption Petition, Exh. 2.

[141] Comments were due on February 19, 1993, and replies were due March 1, 1993. 18 Missouri Register 145-46 (Jan.19, 1993). *See* United State Exemption Petition, Exh. 2.

[142] *See* Supplemental Filing of Missouri PSC, filed April 15, 1993.

[143] Southwestern Bell State Exemption Petition at 1-2; GTE State Exemption Petition at 1-2; United State Exemption Petition at 1.

[144] AT&T Exemption Petition at 7-8; Teleport Exemption Opposition at 9.

[145] MFS Exemption Opposition at 8-9.

[146] MFS Exemption Opposition at 15.

[147] MFS Exemption Opposition at 14.

[148] Southwestern Bell Tariff Reply at 50-51; GTE Exemption Reply at 17-18.

[149] In the Matter of a Policy Concerning Expanded Interconnection with Local Telephone Facilities, New Jersey Board of Regulatory Commissioners, Decision and Order, Docket No. TX93010004, at 7-8 (adopted Feb. 11, 1993). *See* Bell Atlantic Exemption Petition at Att. B.

[150] Bell Atlantic Exemption Petition at 4. Bell Atlantic does not request exemption from the Commission's physical collocation requirement on the basis of the New Jersey BRC's decision, but plans to do so if the Commission denies Bell Atlantic's space-based petition with respect to any central offices in New Jersey. *Id.* at 4-5. We denied Bell Atlantic's space-based petition for five central offices in New Jersey. *See* Appendix D. United Telephone Company of New Jersey maintains it is exempt from the Commission's physical collocation requirement because it is not a Tier 1 company, but reserves the right to seek exemption on the basis of the New Jersey BRC's policy when it becomes a Tier 1 company. United State Exemption Petition at 1 n.2. As United of New Jersey is not making a request for exemption at this time, we will take no further action.

[151] MFS Exemption Opposition at 9-10; Eastern Telelogic Exemption Opposition at 5-6.

[152] Bell Atlantic Exemption Reply at 6-7.

[153] In the Matter of Expanded Interconnection With Local Telephone Company Facilities, North Carolina Utilities Commission, Order Promulgating Policy Favoring Choice, Docket No. P-100, SUB 121, at 7-9 (issued Feb. 10, 1993). *See* GTE State Exemption Petition, Att. E; BellSouth Exemption Petition, Exh. 1.

intrastate collocation ever becomes legal in North Carolina at some future time.[154] North Carolina UC does not discuss details regarding negotiation requirements or tariffing requirements.

54. *Pleadings.* United, BellSouth and GTE claim that the North Carolina UC has established a policy favoring permitting LECs to choose whether to offer physical or virtual collocation.[155] AT&T and MFS argue that the North Carolina UC's action cannot serve as grounds for exemption because North Carolina statutes prohibit competition with LECs for intrastate special access.[156] In addition, MFS maintains that the North Carolina UC's policy, permitting but not requiring LECs to offer collocation, does not meet the Commission's criteria for exemption of its physical collocation requirement.[157] BellSouth argues that the North Carolina UC's decision is a final formal order expressing a state policy favoring virtual collocation or LEC choice, and thus is within the criteria for state policy-based exemption established in the *Expanded Interconnection Order*.[158] GTE asserts that AT&T and MFS are mistaken in assuming that North Carolina must permit competition in intrastate access services before it can adopt a valid collocation policy. GTE also maintains that the Commission does not have authority to impose such a condition on North Carolina.[159]

55. *Discussion.* The *Expanded Interconnection Order* states that LECs will be granted exemption from the Commission's physical collocation requirement only in deference to state policies favoring virtual collocation for intrastate expanded interconnection, or for state policies allowing LECs to choose which form of intrastate collocation to offer.[160] Currently, North Carolina forbids collocation for intrastate special access services. The Commission did not intend to permit an exemption from physical collocation where intrastate collocation was prohibited. Therefore, we deny the petitions of United, BellSouth, and GTE for state policy-based exemption from the Commission's physical collocation policy.

8. Ohio

56. *Background.* On February 16, 1993, the Public Utility Commission of Ohio (Ohio PUC) adopted a rule providing LECs with the option of providing either physical collocation, virtual collocation, or both. LECs and interconnectors are required to negotiate interconnection arrangements, and the Ohio PUC must approve each negotiated arrangement. Ohio PUC noted that interconnectors with a bona fide dispute as to the adequacy of the collocation offered by a LEC may file complaints with the Ohio PUC.[161] Ohio PUC required any LEC offering physical collocation at a specific central office to offer it on a nondiscriminatory basis, and adopted minimum standards for virtual collocation.[162] Finally, the Ohio PUC also adopts the Commission's tariffing requirements for virtual collocation established in the *Expanded Interconnection Order*.[163]

57. *Pleadings.* Ameritech, Cincinnati Bell, GTE, and United assert that the Ohio PUC has adopted a policy permitting LECs to choose whether to offer physical or virtual collocation.[164] AT&T asserts that the Ohio PUC's policy permits rather than requires interconnection for intrastate special access services.[165] MFS and IDA and Ohio Linx contend that the Ohio PUC's procedural rules require an evidentiary hearing, and that an order with this alleged procedural defect does not constitute acceptable grounds for exemption.[166] MFS asserts that the Ohio decision cannot be considered a "final order" because there is a pending petition for reconsideration of that order.[167]

58. Ohio PUC interprets its order to require collocation, and to establish conditions under which collocation should take place in Ohio.[168] Ameritech asserts that nothing in the *Expanded Interconnection Order* requires states to mandate intrastate interconnection.[169] GTE claims that AT&T has incorrectly assumed that the Ohio PUC has refused expanded interconnection, when, in fact, Ohio PUC is still considering the issue.[170] Ohio PUC denies that Ohio law requires an evidentiary hearing rather than a notice and comment procedure prior to adoption of a rule.[171] Ameritech argues that the Ohio PUC considered and rejected arguments that a formal evidentiary hearing was required, and that the Commission has no authority to review that finding.[172] Ohio PUC asserts that its opinion is final in spite of the pending petition for reconsideration.[173]

59. *Discussion.* We find that the collocation policy of the Ohio PUC does meet the Commission's criteria for granting an exemption from the Commission's physical collocation requirement.[174] The Ohio PUC requires any LEC offering physical collocation at a specific central

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[154] *Id.* at 7.

[155] United State Exemption Petition at 1; BellSouth State Exemption Petition at 2; GTE State Exemption Petition at 1-2.

[156] MFS Exemption Opposition at 8; AT&T Exemption Opposition at 6-7.

[157] MFS Exemption Opposition at 8-9.

[158] BellSouth Exemption Reply at 41-42.

[159] GTE Exemption Reply at 18-19.

[160] *Expanded Interconnection Order*, 7 FCC Rcd at 7391 (para. 41).

[161] In the Matter of the Investigation Relative to Expanded Interconnection with Local Telephone Company Facilities, Public Utilities Commission of Ohio, Finding and Order, Case No. 92-1992-TP-COI, at 18-19 (adopted Feb. 16, 1993). *See* GTE State Exemption Petition, Att. F.

[162] GTE State Exemption Petition, Att. F at 20-22.

[163] *Id.* at 21.

[164] Ameritech Exemption Petition at 4; GTE State Exemption Petition at 1-2; United State Exemption Petition at 1; Cincinnati Bell Exemption Petition at 1-2.

[165] AT&T Exemption Opposition at 9.

[166] MFS Exemption Opposition at 15; IDA and Ohio Linx Exemption Opposition at 7-8.

[167] MFS Exemption Opposition at 15-16.

[168] Ohio PUC Reply at 2-3. Specifically, LECs must negotiate in good faith with interconnectors regarding collocation arrangements. Ohio Order at 18-19. Any LEC providing physical collocation at a particular central office must provide physical collocation at that office to all that request it, until floor space is exhausted. *Id.* at 20. Finally, LECs must file tariffs with the Ohio PUC for all virtual collocation arrangements negotiated with interconnectors. *Id.* at 21.

[169] Ameritech Exemption Reply at 6-7.

[170] GTE Exemption Reply at 13.

[171] Ohio PUC Reply at 5.

[172] Ameritech Exemption Reply at 7.

[173] Ohio PUC Reply at 5.

[174] In the unlikely event that the Ohio PUC implements its

office to offer it on a nondiscriminatory basis, and adopted minimum standards for virtual collocation.[175] Furthermore, the Ohio PUC adopts the Commission's tariffing requirements for virtual collocation established in the *Expanded Interconnection Order*.[176] In its reply to oppositions to petitions for exemption, the Ohio PUC interprets its order to require collocation.[177] In particular, the Ohio PUC notes that it has a long-standing policy requiring all LECs to mirror their interstate access tariff filings in their Ohio intrastate access tariffs, and therefore LECs were required to file Ohio collocation tariffs for intrastate special access services as soon as their interstate tariffs were filed with the Commission.[178] These facts demonstrate that the Ohio PUC's policy complies with the Commission's guidelines. Accordingly, the petitions for exemption filed by Ameritech, Cincinnati Bell, GTE, and United are granted for their central offices in Ohio.[179]

9. Oklahoma

60. *Background.* On February 11, 1993, the Oklahoma Corporation Commission (Oklahoma CC) concluded that LECs should have the option of providing either physical or virtual collocation on a nondiscriminatory basis. 0)[180] However, Oklahoma CC adopted its policy without reaching the issue of whether collocation or any particular form of expanded interconnection for intrastate special access services is lawful or in the public interest. Oklahoma CC also found that LECs should have the option of providing either physical or virtual collocation on a nondiscriminatory basis, pursuant to negotiations with interconnectors. Oklahoma does not discuss details regarding negotiation requirements or tariffing requirements.

61. *Pleadings.* GTE and Southwestern Bell maintain that the Oklahoma CC has adopted a policy justifying the grant of an exemption from the Commission's physical collocation requirement.[181] AT&T argues that this decision, permitting but not requiring LECs to offer collocation for intrastate special access services, does not meet the Commission's standards for exemption from its physical collocation requirement.[182] MFS contends that this is not a "final order" because the Oklahoma CC decided to delay resolution of some issues to a future proceeding.[183] Southwestern Bell contends that the Oklahoma CC's decision is a final, formal order.[184] GTE observes that the Commission contemplated negotiations on the terms of virtual collocation in the *Expanded Interconnection Order*, and argues that it is not unreasonable for state commissions to require negotiation.[185] GTE claims that AT&T has incorrectly assumed that Oklahoma CC has refused expanded interconnection, and states that Oklahoma CC is still considering the issue.[186]

62. *Discussion.* The Oklahoma CC has expressly declined to decide at this time whether requiring expanded interconnection for intrastate special access services is in the public interest. It is not possible to conclude that the Oklahoma CC has adopted a policy permitting LECs to choose which form of interconnection to offer for intrastate special access services when it declined to reach this preliminary issue. Therefore, we deny GTE's and Southwestern Bell's petitions for exemption to the extent they are based on the interconnection policy of the Oklahoma CC.

10. Pennsylvania

63. *Background.* On February 11, 1993, the Pennsylvania Public Utilities Commission (Pennsylvania PUC) found that expanded interconnection was in the public interest because it fosters competition and infrastructure development, but that it is not necessary to mandate one particular form of competition over another.[187] Pennsylvania PUC concluded that it is "inevitable" that collocation will occur in Pennsylvania as a result of the *Expanded Interconnection Order*, and that MFS of Pittsburgh and Philadelphia and Bell of Pennsylvania have filed experimental tariffs.[188] As a result, Pennsylvania PUC did not discuss whether collocation for intrastate special access services is required or merely permitted in its jurisdiction, nor did it discuss implementation schedules. The Pennsylvania PUC also adopted the Commission's standards for virtual interconnection arrangements.[189] In addition, the Pennsylvania PUC initiated an investigation into issues of rates for physical and virtual collocation, the effect of collocation on rates for other intrastate services, technical interconnection standards, and related issues.[190]

64. The Pennsylvania PUC took action in the form of a "statement of policy" rather than a "rule."[191] The Pennsylvania PUC states that the most frequently noted difference between statements of policy and rules are that

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collocation policy in a manner that is inconsistent with the goals of the Commission's *Expanded Interconnection Order*, we will reexamine our grant of petitions for exemption based on the Ohio PUC's implementation of its policy.

175 GTE State Exemption Petition, Att. F at 20-22.

176 *Id.* at 21.

177 Ohio PUC Reply at 2-3.

178 Ohio PUC Reply at 2-3.

179 Whether the Ohio PUC should have adopted its policy in an evidentiary hearing rather than a notice and comment procedure is a question of state law on which we express no opinion. Nor do we express an opinion on Ohio PUC's conclusion that its opinion is final in spite of the pending petition for reconsideration. Ohio PUC Reply at 5. However, if the Ohio PUC's Order is vacated by a court decision, or substantially revised on reconsideration, we would consider re-examining our exemption grants.

180 In the Matter of the Application for an Order Limiting Collocation for Special Access to Virtual or Physical Collocation at the Option of the Local Exchange Carrier, Oklahoma Corporation Commission, Cause No. 920001448, Order No. 371739, at 2-3 (adopted Feb. 11, 1993). *See* GTE State Exemption Petition at Att. G; Southwestern Bell State Exemption Petition at Att.

181 Southwestern Bell State Exemption Petition at 1-2; GTE State Exemption Petition at 1-2.

182 AT&T Exemption Opposition at 9-10.

183 MFS Exemption Opposition at 15.

184 Southwestern Bell Tariff Reply at 50-51.

185 GTE Exemption Reply at 12-13.

186 GTE Exemption Reply at 13.

187 Statement of Policy on Expanded Interconnection for Intrastate Special Access, Opinion and Order, Docket No. M-00920376, at 39 (adopted Feb. 11, 1993). *See* GTE State Exemption Petition, Att. H at 39; Bell Atlantic Exemption Petition at Att.

188 *Id.* at 39.

189 *Id.* at 31-33, *citing Expanded Interconnection Order*, 7 FCC Rcd at 7392-93 (para. 44).

190 *Id.* at 40.

191 *Id.* at 38.

rules have the force and effect of law and are finally determinative of the issue, while statements of policy are not.[192] Pennsylvania PUC concludes that it is free to exercise its discretion to follow or not to follow this policy in individual cases.[193]

65. *Pleadings.* United, GTE, and Bell Atlantic contend that the Pennsylvania PUC has adopted a formal policy decision permitting LECs to choose whether to offer physical or virtual collocation.[194] According to MFS and Eastern Telelogic, the Pennsylvania PUC adopted a "statement of policy" rather than a "rule," which the commenters maintain is inconsistent with the Pennsylvania PUC's procedural rules.[195] MFS claims that this is not a "final order" because the Pennsylvania PUC decided to delay resolution of some issues to a future proceeding.[196] Bell Atlantic replies that there is nothing in the *Expanded Interconnection Order* which would preclude the Pennsylvania PUC's statement of policy from being the "formal decision" contemplated in that Order. Bell Atlantic also contends that the Commission has no authority to determine whether the Pennsylvania PUC has complied with its own procedural rules.[197]

66. *Discussion.* The Pennsylvania PUC's statement of policy explicitly acknowledges that it does not constitute a final order, and thus does not meet the Commission's criteria for granting an exemption from the physical collocation requirement. The Pennsylvania PUC states that its expanded interconnection statement of policy does not have the force and effect of law, is not unequivocally determinative of the issue, and is not a binding norm.[198] The Pennsylvania PUC also declares that, in general, statements of policy are "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[199] Given the Pennsylvania PUC's interpretation of its Order, we cannot find that it is a final order for which the Commission intended to grant LECs exemption.[200]

67. Furthermore, the Pennsylvania PUC's order does not explicitly require LECs within its jurisdiction to provide collocation. Rather, it appears that the Pennsylvania PUC has acquiesced to expanded interconnection, that it has permitted rather than required intrastate collocation to occur. The Commission did not intend to grant exemptions of the physical collocation requirement where a state permits LECs to decide whether or not to provide collocation for intrastate special access services. Accordingly, we deny Bell Atlantic's, United's, and GTE's petitions for exemption for their central offices in Pennsylvania.

11. West Virginia

68. *Background.* On February 11, 1993, the West Virginia Public Service Commission (West Virginia PSC) adopted a rule to "permit Tier 1 Local Exchange Carriers to offer expanded interconnection for intrastate special access, either on physical or virtual collocation basis."[201] The West Virginia PSC also found that LECs and interconnectors should be free to negotiate mutually satisfactory expanded interconnection arrangements, and granted both parties rights to seek regulatory review of the arrangement.[202] West Virginia PSC also requires each LEC that must file reports, data, and tariffs with the Commission to file the same information with the West Virginia PSC in accordance with the same time schedules.[203]

69. *Pleadings.* GTE and Bell Atlantic contend that the West Virginia PSC has adopted a formal policy decision permitting LECs to choose whether to offer physical or virtual collocation.[204] Oppositions focusing on West Virginia PSC's collocation policy are summarized in Section III.B. of this Order, *supra.*

70. *Discussion.* We deny Bell Atlantic's and GTE's petitions for exemption for their central offices located in West Virginia. The West Virginia PSC's order does not explicitly require LECs within its jurisdiction to provide collocation for intrastate special access services. Rather, it appears that LECs in West Virginia are permitted to choose whether to provide intrastate collocation at all. As we discussed with respect to other state policies above, the Commission did not contemplate granting petitions for exemption for state policies which permit LECs to decide whether to provide expanded interconnection for intrastate special access services. Therefore, we deny GTE's and Bell Atlantic's petitions to the extent they are based on the interconnection policy of West Virginia.

12. Wisconsin

71. *Background.* On February 12, 1993, the Wisconsin Public Service Commission (Wisconsin PSC) decided to permit LECs to choose to provide either virtual or physical collocation to satisfy requests for intrastate expanded interconnection. Wisconsin requires LECs to offer intrastate expanded interconnection services under tariff, for both physical and virtual collocation.[205] The Wisconsin PSC also adopted rules mirroring Section 64.1401(d) and

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[192] *Id.* at 36-37, *citing* Pennsylvania Human Relations Commission v. Norristown Area School District, 473 Pa. 334, 374 A.2d 671 (1977).

[193] *Id.* at 38.

[194] Bell Atlantic Exemption Petition at 4; GTE State Exemption Petition at 1-2; United State Exemption Petition at 1.

[195] Eastern Telelogic Opposition at 6-7; MFS Exemption Opposition at 15.

[196] MFS Exemption Opposition at 15.

[197] Bell Atlantic Exemption Reply at 7-8.

[198] Pennsylvania Order at 38.

[199] *Id.* at 37, *quoting* Pacific Gas and Electric v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974).

[200] We emphasize that we do not base our decision on MFS's contention that the Pennsylvania PUC did not follow its procedural rules. This is a question of state law on which we express no opinion. Nor do we conclude that the Pennsylvania PUC's order is not final merely because it has instituted an investigation of issues of tariff rates, terms, and conditions for expanded interconnection service, as MFS asserts.

[201] Proposed Statement of Policy on Expanded Interconnection for Interstate Special Access Proceeding on the Commission's Own Motion, Public Service Commission of West Virginia, Commission Order, Case No. 92-1267-T-GI, at Appendix A (adopted Feb. 11, 1993). *See* GTE State Exemption Petition, Att. I; Bell Atlantic Exemption Petition at Att.

[202] *Id.* at 5-6.

[203] *Id.* at 10.

[204] Bell Atlantic Exemption Petition at 4; GTE State Exemption Petition at 1-2.

[205] *Id.* at 20.

(e) of the Commission's Rules, 47 CFR § 64.1401(d) and (e). In addition, the Wisconsin PSC intended to strictly scrutinize and investigate any situation in which it appears that virtual collocation is being used to frustrate X" competition rather than offered as a reasonable substitute for physical collocation. Finally, the Wisconsin PSC expected Ameritech and GTE to offer physical collocation in at least one central office each.[206]

72. *Pleadings.* GTE and Ameritech contend that the Wisconsin PSC has adopted a formal policy decision permitting LECs to choose whether to offer physical or virtual collocation.[207] MFS claims that this is not a "final order" because the Wisconsin PSC stated an intention to re-examine its expanded interconnection decision after it has gained more experience with intrastate expanded interconnection.[208]

73. *Discussion.* The Wisconsin PSC requires LECs to file tariffs for the provision of expanded interconnection for intrastate special access services. Thus, LECs in Wisconsin are required to offer collocation in some form. In addition, the Wisconsin PSC provided a reasonable opportunity for interested parties to comment, and adopted its policy in a final, formal order. The Wisconsin PSC stated that it would consider examining the effects of collocation on special access costs and service quality after the LECs in its jurisdiction have more experience with the provision of expanded interconnection.[209] We conclude that MFS is mistaken in asserting that deferring consideration of these issues to a future proceeding makes the Wisconsin Order a "non-final" order, because LECs in Wisconsin are now required to provide intrastate interconnection under the terms of the Wisconsin Order. We conclude that the Wisconsin PSC has adopted a collocation policy which can serve as a basis for exemption from the Commission's physical collocation requirement. Accordingly, the petitions for exemption filed by Ameritech and GTE are granted with respect to their central offices in Wisconsin.

IV. CONCLUSION

74. For the reasons discussed above, we grant the petitions for exemption from the Commission's physical collocation requirement based on space limitations filed by all parties, except for 13 central offices of Bell Atlantic[210] and 12 central offices of GTE, as specified in Appendix D of this Order.[211] In addition, we grant petitions for exemption based on the state expanded interconnection policies of Arkansas, Indiana, Maryland, Ohio, and Wisconsin, and deny petitions for exemption based on any other state policy. The Commission in the *Expanded Interconnection Order* required LECs to file physical expanded interconnection tariffs for those central offices for which they requested exemption on the basis of a state policy.[212] Ameritech, BellSouth, and GTE filed state policy exemption requests but failed to file the required physical collocation tariffs for those states. Above, we denied BellSouth's state policy-based petition for exemption that relied upon decisions of the Alabama and North Carolina commissions, and we denied GTE's state policy-based petition that relied upon decisions of the Alabama, Missouri, North Carolina, Oklahoma, Pennsylvania, and West Virginia state commissions. Accordingly, we direct BellSouth and GTE to file physical collocation tariffs for special access expanded interconnection in these states.[213]

75. We have granted, in whole or in part, the petitions for exemption from physical collocation filed be BellSouth, Centel, Cincinnati Bell, GTE, and United. However, these carriers have not filed the virtual collocation tariffs required by the *Expanded Interconnection Order*.[214] Therefore, we require these carriers to file these tariffs.[215]

V. ORDERING CLAUSES

76. Accordingly, IT IS ORDERED that the petitions for exemption filed by Ameritech Operating Companies; Bell Atlantic Telephone Companies; BellSouth Telecommunications, Inc.; Central Telephone Company; Cincinnati Bell Telephone Company; GTE Service Corporation;

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[206] Investigation Into Expanded Interconnection With Local Telephone Company Facilities, Public Service Commission of Wisconsin, Findings of Fact, Conclusions of Law and Final Order, 05-TI-131, at 15-18 (adopted Feb. 11, 1993). *See* GTE State Exemption Petition, Att. J at 15-18; Ameritech Exemption Petition, Exh. G at 15-18.

[207] Ameritech Exemption Petition at 4-5; GTE State Exemption Petition at 1-2.

[208] MFS Exemption Opposition at 15.

[209] GTE State Exemption Petition, Att. J at 12.

[210] While we deny Bell Atlantic's exemption request based on space limitations for 13 central offices, Bell Atlantic is not required to file physical collocation tariffs for two of those central offices at this time because we have granted its request for exemption on the basis of Maryland's intrastate collocation policy on a temporary basis. Accordingly, we list only eleven Bell Atlantic central offices in Appendix D.

[211] The *Expanded Interconnection Order* requires LECs to file tariff revisions within 14 days of the release date of this Order to make physical collocation available at those central offices where space-based petitions for exemption are denied. *Expanded Interconnection Order*, 7 FCC Rcd at 7490-91 (para. 260). However, in order to provide Bell Atlantic and GTE sufficient time to develop adequate cost support for these tariffs, and to establish a pleading cycle that is consistent with the pleading cycles for tariff filings required by the companion order, we waive this filing schedule. Bell Atlantic and GTE are required to file physical collocation tariffs for the central offices listed in Appendix D of this Order on or before July 9, 1993, to take effect on 30 days' notice.

[212] *Id.* at 7491 (para. 261).

[213] It would serve no purpose at this time to require LECs whose exemption requests were granted to file physical collocation tariffs as they were required to by the *Expanded Interconnection Order*. We note, however, that compliance with Commission filing requirements is not optional, and that we expect full compliance with such requirements.

[214] *Expanded Interconnection Order*, 7 FCC Rcd at 7491 (para. 261).

[215] It would serve no purpose at this time to require LECs whose requests for exemption from physical collocation were denied to file virtual collocation tariffs for the central offices covered by those requests, even though they were required to make such filings by the *Expanded Interconnection Order*. Therefore, these five carriers are required to file virtual collocation tariffs only for those offices for which their exemption requests have been granted. We note, however, that compliance with Commission filing requirements is not optional, and that in the future we expect full compliance with such requirements.

Southwestern Bell Telephone Company; United Telephone Companies; and US West Communications, Inc., ARE GRANTED to the extent indicated above, and otherwise ARE DENIED.

77. IT IS FURTHER ORDERED that, pursuant to Section 1.3 of the Commission's Rules, 47 CFR § 1.3, Ameritech Operating Companies; Bell Atlantic Telephone Companies; Southwestern Bell Telephone Company; and US West Communications, Inc., ARE GRANTED waiver of the Commission's virtual collocation requirement to the extent indicated above.

78. IT IS FURTHER ORDERED that Bell Atlantic Telephone Companies and GTE Service Corporation SHALL FILE, no later than July 9, 1993, physical collocation tariffs for special access expanded interconnection to become effective on 30 days' notice, for the central offices listed in Appendix D of this Order.

79. IT IS FURTHER ORDERED that BellSouth Telecommunications, Inc. SHALL FILE, no later than June 14, 1993, physical collocation tariffs for special access expanded interconnection for its central offices in Alabama and North Carolina, to be effective no later than June 16, 1993.

80. IT IS FURTHER ORDERED that GTE Service Corporation SHALL FILE, no later than June 14, 1993, physical collocation tariffs for special access expanded interconnection for its central offices in Alabama, Missouri, North Carolina, Oklahoma, Pennsylvania, and West Virginia, to be effective no later than June 16, 1993.

81. IT IS FURTHER ORDERED that BellSouth Telecommunications, Inc., Central Telephone Company; Cincinnati Bell Telephone Company; GTE Service Corporation; and United Telephone Companies SHALL FILE, no later than June 14, 1993, virtual collocation tariffs for special access expanded interconnection for all their central offices in which their petitions for exemption from the Commission's physical collocation requirement have been granted, to be effective no later than June 16, 1993.

82. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 93-466.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

APPENDIX A

Petitions:

Companies filing separate petitions for state-based exemptions and space-based exemptions:[1]

BellSouth Telecommunications, Inc. (BellSouth)

GTE Service Corporation, on behalf of its GTE affiliated Telephone Operating Companies and the GTE System Telephone Companies (together, GTE)[2]

Southwestern Bell Telephone Company (Southwestern Bell)

United Telephone Companies (United)

US West Communications, Inc. (US West)

Companies requesting state-based exemptions and space-based exemptions in one petition:[3]

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

Company seeking only state-based exemptions:[3]

Cincinnati Bell Telephone Co. (Cincinnati Bell)

Company seeking only space-based exemptions:[3]

Central Telephone Company (Centel)

Oppositions and Comments:

American Telephone and Telegraph Co. (AT&T)

Secretary of Defense (Defense)

Eastern Telelogic Corporation (Eastern Telelogic)

Electric Lightwave, Inc. (Electric Lightwave)

Joint Opposition of Ohio Local Interconnection Exchange Company and Indiana Digital Access (IDA and Ohio Linx)

Intermedia Communications of Florida, Inc. (Intermedia)

MFS Communications Company, Inc. (MFS)

Teleport Communications Group, Inc. (Teleport)

Replies:

Ameritech

Bell Atlantic

BellSouth

GTE

[1] We refer to these petitions as "state exemption petitions" or "space exemption petitions" respectively.

[2] Although the GTE affiliated Telephone Operating Companies and the GTE System Telephone Companies filed expanded interconnection tariffs separately, they filed their petition for exemption jointly.

[3] We refer to these petitions as "exemption petitions."

Public Utility Commission of Ohio (Ohio PUC)
Southwestern Bell
United and Centel[4]
US West

Parties filing Expanded Interconnection Tariffs Who Did Not Petition for Exemption from the Collocation Requirements:

Lincoln Telephone and Telegraph Company
NYNEX Telephone Companies
Pacific Bell
Nevada Bell
Rochester Telephone Corporation
Southern New England Telephone Company

APPENDIX B

States Claimed by Parties to Have Adopted A Policy Justifying Exemption

Alabama
Arkansas
Indiana
Maryland
Missouri
New Jersey
North Carolina
Ohio
Oklahoma
Pennsylvania
West Virginia
Wisconsin
District of Columbia

APPENDIX C

Central Offices for Which LECs Seek Exemption From Physical Collocation on the Basis of Lack of Space

(An asterisk indicates that the LEC requests exemption from virtual as well as physical collocation requirements at that location.)

A. Ameritech[1]

1. SCBGILCO, Schaumburg, IL
2. SCBGILRS, Schaumburg, IL
3. EVVLINO3, Evansville, IN
4. ADAMIMN, Ada, MI
5. FMHLMIFH, Farmington Hills, MI
6. LNNGMINW, Lansing, MI
7. ZELDMIZL, Zeeland, MI
8. AKRNOH86, Akron, OH
9. BKPKOH97, Brookpark, OH
10. CYFLOH92, Cuyahoga Falls, OH
11. DBLNOH89, Dublin, OH
12. HLRDOH87, Hilliard, OH
13. ORGNOH69, Oregon, OH
14. TOLDOH21, Toledo, OH
15. MDSNWI15, Madison, WI
16. MILWWI13, Milwaukee, WI
17. SPRRWI13, Superior, WI
18. STRTWI11, Sturtevant, WI
19. SCBGILRR, Schaumburg, IL *
20. SCBGILOI, Schaumburg, IL *
21. BLPROH42, Belpre, OH *

B. Bell Atlantic[2]

1. ALTWPAAL, Allentown, PA
2. BHLHPABE, Bethlehem, PA
3. CPHLPACH, Camp Hill, PA
4. GPIAPAMT, Greater Pittsburgh International Airport
5. KGPRPAKP, King of Prussia, PA
6. PHLAPALO, Philadelphia, PA
7. MBRGPAME, Mechanicsburg, PA
8. PITBPAOK, Pittsburgh, PA
9. PAOLPAPA, Paoli, PA
10. RBTPPART, Robinson Township, PA
11. WAYNPAWY, Wayne, PA
12. WLBRPAWB, Wilkes-Barre, PA
13. BDBKNJBD, Bound Brook, NJ
14. CRHLNJCH, Cherry Hill, NJ
15. FRFDNJFA, Fairfield, NJ
16. LTFYNJLF, Little Ferry, NJ
17. PNNKNJPN, Penns Neck, NJ
18. PRTNNJPC, Princeton, NJ
19. RCPKNJ02, Rochelle Park, NJ

[4] United and Centel filed a joint reply.
[1] Ameritech Petition at 7.-
[2] Bell Atlantic Petition at Att. A.

20. RTFRNJRU, Rutherford, NJ

21. UNCYNJ02, Union City, NJ
22. WHIPNJWH, Whippany, NJ
23. WYCKNJWK, Wyckoff, NJ
24. CLPKMDBW, College Park, MD
25. CCVLMDCH, Churchville, MD

26. FPATMDFR, Linthicum, MD
27. CYVLMDDA, Cockeysville, MD /0*
28. HYVLMDHY, Hyattsville, MD
29. CLMAMDOB, Columbia, MD
30. OWMLMDOM, Owings Mills, MD

31. SLSPMDSS, Silver Spring, MD
32. STLDMDSL, Suitland, MD
33. ARTNVAAR, Arlington, VA
34. FRFXVABF, Springfield, VA
35. CNVIVACT, Centreville, VA

36. ARTNVACK, Arlington, VA
37. CLPPVACU, Culpeper, VA
38. FRFXVAFF, Fairfax, VA
39. ARTNVAFC, Arlington, VA
40. RSTNVAFM, Herndon, VA

41. MCLNVALV, McLean, VA
42. PNTGVADF, Pentagon
43. NRFLVASP, Norfolk, VA
44. RCMDVASR, Richmond, VA
45. LYBGVAYB, Rustburg, VA

46. WASHDCFI, Washington, DC
47. WASHDCMO, Washington, DC
48. HDVLWVHV, Hedgesville, WV
49. MSTNDEMA, Marshallton, DE

C. BellSouth[3]

1. CHPLFLJA Chipley, FL
2. GSVLFLMA Gainesville, FL
3. JCVLFLJT Jacksonville, FL
4. JCVLFLSJ Jacksonville, FL
5. LKMRFLMA Lake Mary, FL

6. LYHNFLOH Lynn Haven, FL
7. MNDRFLAV Bay Meadows, FL
8. NDADFLGG North Dade, FL
9. PNSCFLFP Pensacola, FL
10. TUKRGAFL Tucker, GA

11. LSVLKYAP Louisville, KY
12. LSVLKYBR Louisville, KY
13. LSVLKYWE Louisville, KY
14. PDCHKYMA Paducah, KY
15. CLMASCSN Columbia, SC

16. GNVLSCWR Greenville, SC
17. MMPHTNMA Memphis, TN
18. MMPHTNMT Memphis, TN
19. MMPHTNST Memphis, TN

D. Centel[4]

East Florida

1. Tallahassee Main
2. "385" Central Office
3. "576" Central Office
4. "893" Central Office
5. "562" Central Office
6. Woodville Central Office
7. "877" Central Office

West Florida

8. "862" Central Office
9. Hollywood Blvd.
10. Mary Esther

Nevada

11. East 1
12. East 2
13. East 7
14. North 8
15. South 5
16. South 6
17. South-South
18. West-West

E. GTE[5]

[3] BellSouth Exemption Petition at Exh. 1; BellSouth Exemption Reply at 39.
[4] Centel Petition at Att. A.
[5] GTE Petition at Att. 1.

1. WLANCAXH Bundy, CA
2. EDMTCAXF Edgemont, CA
3. LNBHCAXF Long Beach, CA
4. MDVWCAXF Meadowview, CA
5. PLSPCAXG Palm Springs, CA

6. SNBRCAXK San Bernadino, CA
7. SNMNCAXG Santa Monica, CA
8. SURFCAXF Vandenburg Air Force Base, CA
9. THOKCAXF Thousand Oaks, CA
10. WMNSCAXF Westminster, CA

11. BHPKFLXA Beach Park, FL
12. FHSDFLXA Feathersound, FL
13. WSSDFLXA Westside, FL
14. YBCTFLXA Ybor, FL
15. BLTNILXD Bloomington, IL

16. CRTHILXC Carthage, IL
17. DKLBILXA DeKalb, IL
18. LXTNKYXA Lexington, KY
19. TGRDORXA Tigard, OR
20. MYBHSCXM Myrtle Beach, SC

21. IRNGTXXB Irving, TX
22. IRNGTXXD Irving, TX
23. IRNGTXXA Irving, TX
24. PLANTXXA Plano, TX
25. DLLSVAXA Dulles Airport, VA

26. GRBRVAXA Great Bridge, VA
27. EVRTWAXC Everett, WA
28. EVRTWAXF Everett, WA

F. Southwestern Bell[6]

1. KSCYMO09 Kansas City, Mo. *

G. United[7]

1. Maitland, FL
2. Warrensburg, MO

H. US West[8]

1. LKWDCOMA Lakewood, CO
2. MNMTCOMA Monument, CO
3. WMNSCOMA Westminster, CO
4. DVNPIADT Davenport, IA
5. MPLSMNPI Minneapolis, MN

6. BLTNMNNO Minneapolis, MN
7. CHNDAZWE Chandler, AZ
8. DRVYAZNO Deer Valley, AZ
9. PHNXAZSE Phoenix, AZ)*
10. SCDLAZTH Scottsdale, AZ

11. PLMOMNFE Minneapolis, MN
12. EXCLMNEX Minneapolis, MN
13. EDPRMNEP Eden Prairie, MN
14. EAGNMNLB Eagan-Lexington, MN
15. PTLDOR11 Portland, OR

16. MRRYUTMA Murray, UT
17. SLKCUTWE Salt Lake City, UT
18. BLLVWAGL Bellevue, WA
19. STTLWADU Seattle, WA
20. CHYNWYMA Cheyenne, WY

21. Pocatello ID *

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[6] Southwestern Bell Exemption Petition at 1-2.
[7] United Petition at Att. 1, Att. 2.
[8] US West Petition at 2-4; US West Erratum, filed Apr. 27, 1993.

APPENDIX D

Central Offices for Which Space-Based Exemption Is Denied

I. Bell Atlantic[1]

1. CPHLPACH, Camp Hill, PA
2. MBRGPAME, Mechanicsburg, PA
3. CRHLNJCH, Cherry Hill, NJ
4. LTFYNJLF, Little Ferry, NJ
5. RTFRNJRU, Rutherford, NJ

6. UNCYNJ02, Union City, NJ
7. WHIPNJWH, Whippany, NJ
8. CLPPVACU, Culpeper, VA
9. MCLNVALV, McLean, VA
10. RCMDVASR, Richmond, VA

11. LYBGVAYB, Rustburg, VA

I. GTE

1. EDMTCAXF Edgemont, CA
2. LNBHCAXF Long Beach, CA
3. SNBRCAXK San Bernadino, CA
4. SNMNCAXG Santa Monica, CA

5. SURFCAXF Vandenburg Air Force Base, CA
6. WMNSCAXF Westminster, CA
7. TGRDORXA Tigard, OR
8. MYBHSCXM Myrtle Beach, SC
9. PLANTXXA Plano, TX
10. GRBRVAXA Great Bridge, VA

11. EVRTWAXC Everett, WA
12. EVRTWAXF Everett, WA

[1] Bell Atlantic's central offices in Churchville, MD (CCVLMDCH), and Owings Mills, MD (OWMLMDOM) do not qualify for space-based exemption. However, Bell Atlantic is not required to file physical collocation tariffs for these central offices at this time, because we have granted its request for exemption on the basis of Maryland's intrastate collocation policy on a temporary basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Ameritech Operating Companies Revisions to Tariff FCC No. 2	Transmittal Nos. 697, 711
Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 1	Transmittal Nos. 557, 571
BellSouth Telecommunications Inc. Revisions to Tariff FCC No. 1	Transmittal Nos. 92, 111
Cincinnati Bell Telephone Company Revisions to Tariff FCC No. 35	Transmittal Nos. 620, 627
Centel Telephone Company Revisions to Tariff FCC No. 1	Transmittal Nos. 217, 225
GTE System Telephone Companies Revisions to Tariff FCC No. 1	Transmittal Nos. 34, 44
GTE Telephone Operating Companies Revisions to Tariff FCC No. 1	Transmittal Nos. 771, 790
Lincoln Telephone and Telegraph Co. Revisions to Tariff FCC No. 3	Transmittal Nos. 64, 70
Nevada Bell Revisions to Tariff FCC No. 1	Transmittal Nos. 153, 164
NYNEX Telephone Companies Revisions to Tariff FCC No. 1	Transmittal Nos. 165, 197
Pacific Bell Revisions to Tariff FCC No. 128	Transmittal Nos. 1613, 1630
Rochester Telephone Corporation Revisions to Tariff FCC No. 1	Transmittal Nos. 183, 193
Southern New England Telephone Co. Revisions to Tariff FCC No. 39	Transmittal Nos. 555, 564
Southwestern Bell Telephone Company Revisions to Tariff FCC No. 73	Transmittal Nos. 2260, 2279, 2280
United Telephone Companies Revisions to Tariff FCC No. 5	Transmittal Nos. 315, 323
US West Communications, Inc. Revisions to Tariff FCC No. 1	Transmittal Nos. 331, 362

ORDER

Adopted: June 9, 1993; **Released: June 9, 1993**

By the Acting Chief, Common Carrier Bureau:

TABLE OF CONTENTS

	Para. No.
I. INTRODUCTION	1
II. BACKGROUND	2
III. DISCUSSION	4
A. Expanded Interconnection Tariffs	4
B. Rate Levels	8
C. Tariff Filing Requirements	52
1. Physical Collocation	52
2. Virtual Collocation	62
3. Microwave Collocation	75
D. Terms and Conditions	80
1. Collocation in Leased Offices	80
2. References to Outside Agreements	85
3. Entry Points	90
4. Collocated Equipment	92
IV. ORDERING CLAUSES	98

APPENDIX A LECs Filing Expanded Interconnection Tariffs
APPENDIX B Parties Filing Petitions to Reject or Suspend and Investigate
APPENDIX C Rate Allowances
APPENDIX D GSF Adjustment

I. INTRODUCTION

1. On February 16, 1993, the above-captioned Tier 1 local exchange carriers (LECs) filed tariffs offering ex-

panded interconnection for special access services.[1] These tariffs are currently scheduled to become effective June 16, 1993. By this Order, we are advancing the effective date for the expanded interconnection tariffs by one day; partially suspending these tariffs pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a); initiating an investigation with issues to be designated in a subsequent order; imposing an accounting order; rejecting patently unlawful terms and conditions; and ordering tariff revisions.

II. BACKGROUND

2. On October 19, 1992, the Commission released the *Expanded Interconnection Order*,[2] which required Tier 1 LECs to file tariffs offering expanded interconnection for special access services to all interested parties.[3] Specifically, the *Expanded Interconnection Order* required these LECs to permit competitors and users to terminate their own special access transmission facilities at LEC central offices and interconnect with LEC special access services.[4] The *Expanded Interconnection Order* mandated interconnection through the provision of physical collocation, except in limited instances upon Commission approval;[5] and virtual collocation where physical collocation is not provided and in certain other circumstances.[6]

3. Ten parties filed petitions against the tariffs; all the tariffs were petitioned against by one or more parties.[7] Each LEC filed a reply. Also on February, 16, 1993, nine petitions for exemption from physical, and sometimes virtual, collocation based on space exhaustion and/or state policy grounds were filed by the LECs. Eight oppositions were filed and eight replies. We deal with these petitions in a companion order which is being released concurrently with this Order.[8]

III. DISCUSSION

A. Expanded Interconnection Tariffs

4. *Pleadings.* Generally, the petitioners urge the Commission to partially suspend the LECs' rates, impose an

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[1] These LECs are listed in Appendix A. The abbreviations for the LECs as indicated in the Appendix are used throughout this Order. GTOC and GSTC are also referred to collectively as GTE.

[2] Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order), recon.*, 8 FCC Rcd 127 (1992) (*Expanded Interconnection Modification Order), pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[3] *Id.* at 7372, 7398. The *Expanded Interconnection Order* excluded NECA pool members from this filing requirement. This effectively excluded only Puerto Rico Telephone Company, which is the only Tier 1 LEC that is also a NECA pool member. *Id.* at 7398.

[4] *Id.* at 7372.

[5] *See* Section III.C.1, *infra*.

[6] *See* Section III.C.2, *infra*.

[7] These petitioners and the LECs against which they filed are listed in Appendix B. The abbreviations for the parties as indicated in the Appendix are used throughout this Order.

The petitions to reject or suspend and investigate the expanded interconnection tariffs were due on March 15, 1993. PUCO filed its petition on March 16, 1993, concurrently with its motion to accept late-filed pleading. PUCO avers that it was unable to file on time due to the severe weather that struck the country over the weekend of March 13-14, 1993. PUCO asserts that it both faxed and sent by overnight delivery copies of its petition and motion to accept late-filed pleading to the LECs' counsel on March 16. PUCO argues that since parties received actual notice of the filing sooner than they would have had PUCO filed on March 15 and served the parties by first-class mail, acceptance of its late-filed petition would not prejudice any party. PUCO Motion for Acceptance of Late-Filed Pleading at 1-2. No party opposed PUCO's motion.

MFS filed its petition on March 17, 1993, concurrently with its motion to accept late-filed pleading. MFS avers that it was unable to file on time because the severe weather that struck the country over the weekend of March 13-14, 1993, stranded several key MFS personnel during their travels, and caused its law firm's voice messaging system to become overloaded, thereby preventing these MFS personnel from arranging conference calls with counsel over the weekend to finalize the document. MFS asserts that it had copies of its petition and motion hand-delivered to the LECs' counsel, the Common Carrier Bureau, and the Tariff Division before 3 p.m. on March 17. MFS argues that since parties received actual notice of the filing sooner than they would have had MFS filed on March 15 and served the parties by first-class mail, acceptance of its late-filed petition would not prejudice any party. MFS Motion to Accept Late-Filed Pleading at 1-3. Bell Atlantic filed an opposition to MFS's motion to accept late-filed pleading, contending that MFS provides no valid justification for filing its petition late. Bell Atlantic asserts that since MFS's March 3 *ex parte* submission addressed many of the tariff issues, MFS must have already obtained ample input from MFS personnel in this proceeding. Bell Atlantic also notes that all other carriers were able to file their oppositions in a timely manner, including one represented by the same law firm as MFS and thus, Bell Atlantic asserts, presumably subject to the same voice messaging system overload and storm problems that inhibited MFS's filing. Bell Atlantic also claims that it did not receive MFS's petition until March 18, not March 17 as MFS contends. Bell Atlantic Opposition at 1-3. MFS replies that it delivered copies of its filing to its messenger service on March 17 for immediate delivery and was not aware, until it investigated the situation in response to Bell Atlantic's claim, that two parties did not receive delivery until March 18. MFS continues to insist that neither Bell Atlantic nor any other party to this proceeding was materially prejudiced as a result of MFS's late filing because on March 26, the Commission granted all LECs an additional week to reply to the oppositions to their collocation tariffs, thereby giving them adequate time to review and respond to MFS's petition. MFS further asserts that the public interest in compiling a complete record would be served by acceptance of its late-filed pleading. MFS Reply at 1-3.

We find that PUCO and MFS have shown good cause for their late filing. Accordingly, we grant MFS's and PUCO's motions and accept their pleadings.

[8] Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Dkt. No. 91-141, Memorandum Opinion and Order, DA 93-658 (rel. June 9, 1993) (*Exemption Order*).

accounting order, and commence an investigation.[9] Some petitioners request rejection or partial rejection, or alternatively, suspension and investigation.[10] Some petitioners state that the Commission should prescribe interim rates.[11] Teleport suggests identifying particular LEC interconnection rates as a baseline to establish maximum permissible rates for particular items to set interim rates.[12] MFS urges the Commission to establish a uniform and objective benchmark by mandating that total recurring and nonrecurring charges under the collocation tariffs should not exceed 25 percent of the LECs' tariffed channel termination and multiplexing charges for an equivalent DS1 circuit.[13] MCI states that the Commission should use a clustering of charges falling at the low end of the range of proposed charges.[14]

5. In response, Bell Atlantic and GTE contend that the Commission's prescription authority under the Communications Act is limited to a Section 205 proceeding, and can only occur after notice and opportunity for a hearing.[15] Bell Atlantic asserts that the Commission has no lawful right to use its partial authorization authority under Section 204(b) to avoid the hearing requirement of Section 205 before prescribing a rate different from that which the carrier originally filed,[16] while GTE claims that the Commission has no authority to impose a partial suspension under Section 204(a).[17] SWB also rejects any suggestion that the Commission employ a partial rate suspension.[18] With respect to rate levels, GTE contends that the Commission does not have the statutory authority to reduce rates to a uniform level, as some commenters suggest.[19] In addition, SWB, GTE, and Ameritech argue that selecting the lowest rates for each rate element could be confiscatory.[20] SWB and Ameritech also assert that this methodology ignores the specific costs that are incurred by different providers in their own markets.[21] SNET, too, asserts that there is no justification for using this method.[22] Pacific argues that a benchmark cannot logically be applied to rates that are based on central office-specific costs. If benchmarking to LEC high capacity rates is used, Pacific states that the comparison is to like-kind rates with no term commitment, since collocators are not held to a term.[23] Pacific also argues that it is reasonable for the collocator to incur the cost of complying with government regulations, and that the costs of modifications to central offices should be borne by interconnectors.[24] CBT argues that lowering nonrecurring charges (NRCs) would effectively shift the cost of interconnection to other CBT ratepayers, since the NRCs are based on cost.[25] GTE opposes suggestions to eliminate NRCs in favor of recurring charges, because use of NRCs to recover building modifications assures that the cost is borne by the cost causer.[26]

6. In addition to the issues summarized in this Order, the parties raise numerous other issues regarding the rates, terms, and conditions of the expanded interconnection tariffs. Many of these issues will be discussed in the context of the upcoming Order designating issues in this docket.

7. *Discussion.* Based on our analysis of the record, and as explained below, we find the LECs' expanded interconnection tariffs raise significant questions of lawfulness regarding cost allocations, resulting rate levels, rate structures, and terms and conditions of service that warrant suspension for one day, investigation, and imposition of an accounting order. We will designate specific issues and establish a pleading cycle for this hearing in a subsequent order. In the interim, we order that the carriers' proposed rates for expanded interconnection be partially suspended pursuant to our authority under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). We also order other tariff revisions.

B. Rate Levels

8. *Pleadings. Collocation Prices Compared to LEC End-To-End DS1 Service Prices.* One argument made by petitioners against the LECs' proposed rates concerns the price of collocation compared to the price of end-to-end DS1 service. Teleport, MFS, PAC, ALTS, and PUCO assert that, in a number of cases, the recurring and nonrecurring rates for physical collocation arrangements result in total costs to the collocator that approach or exceed the LECs' tariffed charges for full end-to-end DS1 service, thereby making it impossible for interconnectors to compete against the LECs.[27] PUCO asserts that this results from the combination of two LEC practices. First, PUCO charges that the level of aggregation in the rate structure denies interconnectors many of the economies that the LEC enjoys when it provides its services. Second, PUCO claims that the underlying costs of certain func-

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[9] MFS Petition at 6-7 (*citing* Bell Atlantic Telephone Companies, 6 FCC Rcd 1436 (1991), and 6 FCC Rcd 4891 (1991)), 9; ALTS Petition at 20 (*citing* same); Ad Hoc Petition at 3 (*citing* Bell Atlantic Telephone Companies, 6 FCC Rcd 1436, 1438 (1991)); Teleport Petition at 1-3 (*citing* Local Exchange Carriers Individual Case Basis DS3 Services, 5 FCC Rcd 4842 (1990) and Bell Atlantic Telephone Companies, 6 FCC Rcd 1436 (1991)); MCI Petition at 3; Sprint Petition at 1.

[10] Ad Hoc Petition at 1-2; MFS Petition at iii; PUCO Petition at 1, 3; TDL Petition at 1-2; PAC Petition at 1, 4. WilTel requests only that the Commission suspend and investigate the LECs' tariffs. WilTel Petition at 1, 12; WilTel Petition (Bell Atlantic) at 1, 7.

[11] MFS Petition at 6-7 (*citing* Bell Atlantic Telephone Companies, 6 FCC Rcd 1436 (1991), and 6 FCC Rcd 4891 (1991)); Ad Hoc Petition at 3 (*citing* Bell Atlantic Telephone Companies, 6 FCC Rcd 1436, 1438 (1991)); Teleport Petition at 1-2, 13 (*citing* Local Exchange Carriers Individual Case Basis DS3 Services, 5 FCC Rcd 4842 (1990) and Bell Atlantic Telephone Companies, 6 FCC Rcd 1436 (1991); MCI Petition at 3; ALTS Petition at i.

[12] Teleport Petition at 4.

[13] MFS Petition at 7-8.

[14] MCI Petition at 3.

[15] Bell Atlantic Reply at App. A Item 25; GTE Reply at 29-31.

[16] Bell Atlantic Reply at App. A Item 25.

[17] GTE Reply at 29-31.

[18] SWB Reply at 46-47.

[19] GTE Reply at 29.

[20] SWB Reply at 46-47; Ameritech Reply at 6; GTE Reply at 29-31.

[21] SWB Reply at 46-47; Ameritech Reply at 6.

[22] SNET Reply at 6.

[23] Pacific Reply at 28-29.

[24] *Id.* at 50-51.

[25] CBT Reply at 8-9.

[26] GTE Reply at 35-36.

[27] Teleport Petition at 3-6, 10-13, and App. B; PAC Petition at 15-19 and Exh. A; ALTS Petition at 4-5 and App. A; PUCO Petition at 16; MFS Petition at 3-7 and Att. B.

tions appear to be recovered in several rate elements, thereby promoting LEC double-recovery. [28] MFS claims that physical collocation charges exceed tariffed DS1 service rates by 100.6 percent for Ameritech; 169.2 percent for Bell Atlantic; 140.9 percent for BellSouth; and 156.1 percent for US West. MFS asserts that the virtual collocation charges exceed tariffed DS1 service rates by 127.9 percent for Ameritech and 118.9 percent for Bell Atlantic.[29] Teleport claims that physical collocation charges per DS1 exceed DS1 retail service cost by $24 for Bell Atlantic; $5 for Ameritech; and $21 for US West. Teleport also alleges that virtual collocation charges per DS1 exceed DS1 retail service cost by $7 for Ameritech and $13 for Bell Atlantic. Teleport further avers that additional ICB charges also apply in the case of Bell Atlantic and US West.[30]

9. The LECs challenge the validity of the petitioners' analyses and deny the petitioners' allegations. CBT argues that the relevant comparison is not to the LECs' own rates for DS1 or DS3, but to the costs of the CAPs constructing their own networks.[31] US West also argues that Teleport ignores the savings a CAP receives by gaining access to LEC channel terminations through collocation arrangements to reach end users versus the cost to a CAP of constructing its own facilities to the end user.[32]

10. Bell Atlantic replies that the petitioners use faulty rate comparisons and other faulty assumptions to reach their erroneous results. For example, Bell Atlantic asserts that petitioners compare month-to-month DS1 collocation rates with 5-year rates for high capacity DS3C service, and argues that this type of "apples to oranges" comparison produces useless and misleading results. Bell Atlantic also charges that MFS and ALTS reduce the price of the non-collocated service by understating the number of multiplexers required; Teleport assumes that GSF costs have been reallocated when such reallocation is not permitted, and overestimates by nearly 100 percent the expected special access rate reductions under Bell Atlantic's rate zone plan; PAC overestimates the amount of collocated space (200 square feet) it will need to terminate only 10 DS1 lines; and all parties assume there will be only one collocator in each office, though many are likely to house two or more.[33] Bell Atlantic asserts that a proper comparison shows that its collocation rates are substantially below those of its comparable DS1 service tariff.[34] Specifically, Bell Atlantic contends that its cross-connect rates are 33 percent to 74 percent of the equivalent channel termination rate.[35]

11. BellSouth and Pacific contend that MFS and Teleport use too low a quantity of DS1s in their computations.[36] BellSouth contends that the results of those computations merely show that collocators using a low number of DS1s would not meet minimum economies of scale that warrant better pricing, and does not prove that rates for expanded interconnection are too high.[37] NYNEX also asserts that the cost per DS1 cross-connect for an interconnector is related to the volume of traffic the interconnector can send out of a collocated enclosure, and that the expanded interconnection tariffs do not guarantee an interconnector that it will be able to achieve any particular level of traffic out of a multiplexing node.[38]

12. BellSouth asserts that Teleport used the wrong channel interface elements. BellSouth contends that if Teleport had used the correct channel interface elements, Teleport's computed cost per DS1 would be $95, not $83 as Teleport computed. Moreover, BellSouth asserts, Teleport incorrectly used BellSouth's term plan B, whereas most of its customers have selected term plan A, the two-year plan. BellSouth asserts that the equivalent DS1 rate would be $103 if the term plan A rates are used. BellSouth also claims it could not duplicate the MFS computations. BellSouth contends that, when computed correctly, its expanded interconnection rates are lower than its computed end-to-end DS1 equivalent rates.[39] Ameritech, too, argues that Teleport's calculations of DS1 costs for physical collocation are incorrect. Ameritech asserts that a proper analysis of relevant rates shows that interconnectors will benefit by purchasing expanded interconnection arrangements rather than end-to-end service.[40]

13. US West attacks as erroneous Teleport's initial assumption, *i.e.*, that total expanded interconnection charges should be less than DS1 or DS3 charges. US West also

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[28] PUCO Petition at 16.

[29] MFS Petition at 5-6. MFS states that in computing the LECs' proposed collocation charges as per-DS1 amounts, it assumed a total of 70 DS1 cross-connects in any given office, and included all recurring charges, a prorata portion of nonrecurring charges amortized over a five-year period, and applicable rollover charges. *Id.* at 5 n.6.

In the *Expanded Interconnection Order*, the Commission uses the term "cross-connect" element to refer specifically and only to the "short cable connection from the LEC distribution frame to the central office electronic equipment owned by or dedicated to the interconnector." *Expanded Interconnection Order*, 7 FCC Rcd at 7442; *see also* Section 69.121(a)(1) of the Commission's Rules, 47 C.F.R. § 69.121(a)(1). It should be noted, however, that the LECs and the petitioners may be using this term to encompass a broader array of expanded interconnection connection charges.

[30] Teleport Petition at 11 and Table 1. Teleport states that its analysis is based on the following assumptions: (1) the collocation cost represents charges paid only to the LEC for space and cross-connections to establish 100 DS1s (an amount Teleport asserts is consistent with its experience and matches the demand forecasted by Ameritech), and includes amortization of nonrecurring charges; and (2) the retail per DS1 cost represents rates for 4 DS3s and associated multiplexing to derive up to 112 DS1s, including a 15 percent reduction to represent zone pricing and elimination of the GSF allocation. *Id.* at 10-13 and Table 1.

[31] CBT Reply at 12-13

[32] US West Reply at App. A.

[33] Bell Atlantic Reply at App. A Item 1.

[34] *Id.*

[35] *Id.* at App. B. In addition, Bell Atlantic claims that while Teleport objects to Bell Atlantic's charges, Teleport's own tariff contains rates in excess of those to which it objects. For example, Bell Atlantic asserts that Teleport's maximum DS1 and DS3 cross-connection charges of $75 and $700 are higher than those of any LEC, and Teleport's minimum DS3 cross-connection charge of $300 is more than double Bell Atlantic's rate. *Id.* at App. A Item 1.

[36] BellSouth Reply at 17-19; Pacific Reply at 25. Pacific would use 4,000 DS1s to make the comparison. Pacific Reply at 26.

[37] Bellsouth Reply at 18-19.

[38] NYNEX Reply at 18.

[39] BellSouth Reply at 17-18 and n.23.

[40] Ameritech Reply at 8 and Exh. A.

contends that there are several flaws in Teleport's comparison of DS1 rates and expanded interconnection rates. US West claims that Teleport mischaracterized its analysis as a comparison of an end-to-end service with provision of empty central office space. US West asserts that its expanded interconnection service includes, *inter alia*, the costs of building cages, power, air conditioning, and security.[41] US West also asserts that Teleport includes only one channel termination charge in its DS1 rate rather than two as would be needed.[42] In addition, US West argues that Teleport understates its DS1 rate by assuming that all DS1 customers would be able to buy DS3s and multiplexing services.[43] According to US West, making these corrections, and assuming that 30 of 100 DS1s are delivered at the standard DS1 rate, increases its average DS1 price to $75.[44] US West also estimates that its costs of constructing collocation space will average $40,000, rather than the $60,000 Teleport estimates, and that 100 feet of inner duct is a more reasonable assumption than Teleport's assumption of 1000 feet. Finally, US West asserts that its average expanded interconnection price is $55.49, rather than $61.62 as Teleport estimates.[45]

14. Centel asserts that MFS provides a flawed comparison of Centel's DS1 costs to its physical collocation cross-connect charges. It asserts that the actual comparison of Centel's DS1 cross-connect charges to its DS1 special access channel termination and multiplexing charges shows that the cross-connect charges are less than three percent of the channel termination and multiplexing charges.[46] GTE argues that the comparisons of MFS and Teleport are incorrect because the two services being compared are unlike and asserts, without elaboration, that the analyses themselves contain errors.[47]

15. NYNEX responds that Teleport's and MFS's comparison of DS1 expanded interconnection service rates to "retail" prices for DS1 service is meaningless. NYNEX asserts that 53 percent of the cost of a "DS1 Cross Connect" as calculated by MFS and Teleport represents the cost for construction of the multiplexing node, or cage, amortized over a five year period. NYNEX points out that it does not construct such nodes to provide its own services (and depreciates its capital accounts for office construction over periods far longer than 5 years).[48] NYNEX further maintains that the multiplexing node in the central office replaces a node the interconnector would have to establish outside the central office building if expanded interconnection were not allowed, and thus it is incorrect to assume that the costs of building a node inside a central office are incremental to the CAP's business operations.[49] NYNEX continues that the costs of space rental, which represent 16 percent of the "DS1 Cross Connect," are not necessarily related to the building costs that NYNEX incorporates into its own DS1 channel termination rates.[50] In addition, NYNEX states that 18 percent of the "DS1 Cross Connect" charge covers NYNEX's NRCs for installations and rollovers, amortized over 5 years. NYNEX notes that MFS and Teleport, however, compare these costs to NYNEX's rates, per DS1, for DS3 services, without NRCs. NYNEX contends a reasonable comparison would be similar to MCI's, which shows NYNEX's expanded interconnection rates for DS1 and DS3 cross-connects are 2.61 percent and 4.80 percent of NYNEX's rates for standard DS1 and DS3 channel terminations, respectively. NYNEX asserts that these differentials provide interconnectors with ample opportunity to compete.[51]

16. *Overhead Costing Methodology*. Another concern raised by the petitioners against the LECs' proposed rates is the overhead costing methodology used by the LECs to price their interconnection service. These concerns involve the use of Fully Distributed Costing (FDC) methods as well as other overhead issues.

17. MFS, TDL, and ALTS object to the LECs' using a FDC methodology to price their expanded interconnection services, while using incremental costing methods to price tariffed services against which collocators will compete.[52] MFS and ALTS contend that this allows the LECs to overrecover overheads from competitors, while underrecovering or not recovering overheads from their own customers,[53] thereby forcing interconnectors to subsidize the LECs' competitive services.[54] TDL, MFS, and ALTS argue that the LECs must be required to use the same methodology to price the collocation arrangements that they use to price the services they provide directly to end users.[55] MFS contends that the inclusion of general overhead loadings is equivalent to using FDC.[56] Thus MFS and TDL urge the Commission to reject or suspend the use of all general overhead loading factors used by the LECs to set collocation rates and charges.[57]

18. GTE replies that the *Expanded Interconnection Order* permits LECs to use fully distributed costing to determine rates for interconnection. Accroding to GTE, limiting rates to direct costs alone would force other services to bear a greater share of costs. GTE states that arguments against FDC methods are properly raised on reconsideration.[58] Bell Atlantic replies that prohibiting

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41 US West Reply at 37-39.
42 *Id.* at 39.
43 *Id.* at 2-3.
44 *Id.* at 3.
45 *Id.* at 4.
46 United/Centel Reply at 20-21.
47 GTE Reply at 31.
48 NYNEX Reply at 17 & n.30.
49 *Id.* at 17-18.
50 *Id.* at 18. NYNEX also contends that Teleport overestimates multiplexing node costs by assuming it will pay $5.33 per square foot per month for node space, when NYNEX's average recurring cost for such space is $3.21. *Id.* n.31.
51 *Id.* at 18.
52 MFS Petition at 16-18; TDL Petition at 6; ALTS Petition at 6.
53 MFS Petition at 17; ALTS Petition at 6.
54 MFS Petition at 17.
55 TDL Petition at 6; ALTS Petition at 7; MFS Petition at 17-18. MFS states that requiring the LECs to employ consistent ratemaking methodologies would serve the goal of preventing LECs from imposing network costs on competitors, but not on similarly situated customers. This, MFS claims, is analogous to the goal of the regulatory scheme adopted in the Commission's ONA Rules. MFS Petition at 18 n.40.
56 *Id.* at 15 & n.31.
57 *Id.* at 15-18, 18 n.40; TDL Petition at 6.
58 GTE Reply at 32-33.

LECs from using FDC for collocation rates, while using average variable costs for high capacity service rates, would require a change in the price cap rules.[59]

19. NYNEX replies that the assumption that LECs price their DS1 and DS3 services at incremental costs is incorrect, that NYNEX does not do so, and that the overall revenues for NYNEX's interstate DS1 and DS3 services exceed fully distributed cost.[60] Centel asserts that it does not apply FDC in a discriminatory manner. Centel avers that it prices special access and expanded interconnection services using a cost methodology that incorporates the direct costs of the service and appropriate overheads.[61] Centel also contends that its overhead loadings are less than the levels ALTS considers excessive.[62] Similarly, Bell Atlantic states that it based the rates for its collocation service, as it does for any new service, on direct costs, plus overhead loadings.[63] SWB, too, asserts that ALTS misunderstands how LECs price their services. SWB claims that it uses incremental cost as a price floor, and that it should not be held to an arbitrary cost allocation methodology that would lead to non-market based rates. SWB claims that no business can survive offering services at average variable cost because joint and common costs to the firm must be recovered for the firm to remain viable. It asserts the LECs must recover overhead costs in the prices of their services. SWB claims that, in total, it recovers overhead costs as fully as if an FDC pricing methodology had been used.[64]

20. Another issue raised by petitioners against the LECs' proposed rates involves the LECs' overhead loadings. ALTS, MFS, Teleport, and TDL assert that the overhead loadings that are identified in the LECs' tariffs are excessive and discriminatory.[65] ALTS contends that, to ensure that overhead loadings are applied in a nondiscriminatory manner, the Commission should require the LECs to establish a collocation overhead loading factor that is consistent with the overhead loadings used in setting rates for their high capacity services, including those subject to volume and term discounts.[66] Teleport avers that the LECs have used special access loading factors which include GSF costs, thereby violating the *Expanded Interconnection Order*'s requirement that no subsidies or contributions be included.[67]

21. ALTS and MFS each contend that BellSouth, NYNEX, Pacific, Centel, and GTE fail to identify or give any justification for their loading factors. They assert that this directly contravenes the requirement in the *Expanded Interconnection Order* that the LECs demonstrate that any overhead loadings they employ are reasonable and do not discriminate against collocators.[68] Teleport contends that BellSouth, Pacific, NYNEX, and GTE used "administrative overhead cost" factors that were inadequately supported. Teleport argues that these carriers should be required to develop and apply special access category loading factors, assuming any loading factor is appropriate.[69]

22. Teleport contends that SWB's loading factors are several times greater than those applied by the other LECs. Teleport points out that while other LECs use special access loading factors between 1.5 and 1.8, SWB uses a factor of 2.26 for a DS1 and 3.53 for a DS3.[70] Teleport asserts that SWB must be required to recompute its rates using reasonable loading factors, or no such factors at all.[71] MFS also states that SWB employs the highest loading factor of any LEC and uses higher loading factors in setting its collocation rates than it does in setting rates for services that are competitive to CAP service offerings. To illustrate, MFS asserts that SWB uses a loading factor of 146 percent for its collocation tariffs, but employs loading factors of between 37 and 71 percent for its Self-Healing Transport Network Service.[72] Ad Hoc contends that SWB's approach to overhead loadings unacceptably distorts the economic relationship between DS1 and DS3 interconnection services by placing a disproportionately high cost recovery burden on DS3 interconnection services.[73]

23. MFS and TDL assert that US West uses higher loading factors in setting its collocation rates than it does in setting rates for services that were designed to compete L against CAP networks.[74] MFS contends that US West uses a loading factor of 83 percent for its collocation tariffs, but employs loading factors of 6 to 51 percent for its Self-Healing Alternate Route Protection Service.[75] Moreover, MFS and TDL contend, US West derived its overhead loading factor using data reflecting the full Part 69 Special Access category. They assert this practice is inappropriate because tariffed cross-connection rates will exist only for DS1 and DS3 services, not the entire array of special access services.[76] Ad Hoc contends that US West has not even attempted to develop or apply overhead cost loadings on a uniform basis. Ad Hoc asserts that the method used by US West results in overhead cost loadings that vary among individual rate elements from 1.83 to 1.09. Ad Hoc insists that these deviations from uniform overhead loadings are inconsistent with the requirements in the *Expanded Interconnection Order*.[77]

24. Ad Hoc faults Bell Atlantic's overhead factor of 1.6845, asserting that the actual ratio of rates to direct costs varies among rate elements from 1.96 to 1.00 for two reasons. First, Ad Hoc alleges that Bell Atlantic misuses the rounding process so that, for example, the loaded costs for a DS1 cross-connect is rounded up from $2.57 to

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[59] Bell Atlantic Reply at App. A Item 11.
[60] NYNEX Reply at 16.
[61] United/Centel Reply at 18-19.
[62] *Id.* at 19 n.38.
[63] Bell Atlantic Reply at App. A Item 11.
[64] SWB Reply at 3-4.
[65] MFS Petition at 18-21; TDL Petition at 5-6; Teleport Petition at App. A Item 2; ALTS Petition at 7-9.
[66] ALTS Petition at 8.
[67] Teleport Petition at 4 n.8 & App. A Item 2.
[68] ALTS Petition at 7-8 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7429); MFS Petition at 18 (*citing* same).
[69] Teleport Petition at App. A Item 2.
[70] In most ratemaking, an overhead loading factor indicates the amount by which direct costs of a rate element are increased in order to recover overhead costs not directly attributable to the service. A loading factor of 1.0 means that the carrier is recovering no overheads for a rate element, while an overhead loading of 2.0 means that the carrier is recovering overheads in an amount equal to direct costs, or, alternatively, that the price is set at twice the level of direct costs.
[71] *Id.* Teleport
[72] MFS Petition at 20.
[73] Ad Hoc Petition at 25-26.
[74] TDL Petition at 6; MFS Petition at 19-20.
[75] MFS Petition at 19-20.
[76] *Id;* MFS TDL Petition at 5-6.
[77] Ad Hoc Petition at 27-28.

$3.00, an increase of nearly 17 percent that results in a rate/cost ratio of 1.96.[78] Second, Ad Hoc avers that since the loading factor was developed relative to net investment, those rate elements that are not associated with investments, such as the design and planning fee and cable installation charge, escape the loading factor entirely, so that these elements have a rate/cost ratio of 1.00. Ad Hoc asserts that Bell Atlantic's rental space charges also have a rate/cost ratio of 1.00, which implies that the loading factor was not applied to these costs despite their investment-related nature. Ad Hoc argues that Bell Atlantic should be made to explain these departures from a uniform rate/cost relationship and to correct those anomalies that cannot be justified.[79] PAC contends that Bell Atlantic is seeking to charge its competitors more than fully distributed costs through loading overhead allocations into its rates.[80] PAC also complains that Bell Atlantic applied account-specific annual cost factors to calculate certain direct cost components, but does not explain what they are or how they are used.[81]

25. Ad Hoc asserts that Nevada has clearly violated the Commission's intent to establish cost-based pricing for expanded interconnection services by applying overhead loadings that are a thinly disguised vehicle for strategic pricing of DS1 and DS3 cross-connections. Ad Hoc argues that the recurring rate of $113.60 for a DS1 cross-connect is four times the reported direct cost of $26.24; and the recurring rate for a DS3 cross-connect is 18 times the direct cost.[82] According to Ad Hoc, Nevada admits that such overheads reflect the cross elastic effects of DS1 and DS3 services, rather than any real overhead costs. Ad Hoc asserts that this would distort the rate relationships between DS1 and DS3 interconnection offerings.[83]

26. In response, NYNEX, Bell Atlantic, SNET, GTE, and US West deny Teleport's claim that the *Expanded Interconnection Order* requires LECs to remove GSF expenses from the factors used to develop uniform overhead loadings.[84] SNET argues that the Commission's intent to disallow a contribution charge in a separate rate element does not apply to overheads or require LECs to disregard the current Part 69 Rules.[85] NYNEX argues that the *Expanded Interconnection Order* only stated that a rulemaking would be initiated to remove the overallocation of GSF to special access, and that even after this has been accomplished, special access rates will continue to recover a proportionate share of GSF costs.[86] NYNEX argues that until the overallocation of GSF is removed, or NYNEX's GSF waiver is granted, it is reasonable for it to use factors that are consistent with the amount of GSF allocated to special access under Part 69.[87] US West also argues that GSF costs should remain part of overheads until the Commission decides otherwise.[88] US West and Bell Atlantic observe that the Bureau recently denied a waiver request to exclude GSF from overheads in the context of the annual access proceeding.[89] US West maintains that it would be inappropriate for the Commission to require removal of GSF costs from expanded interconnection overheads before it resolves GSF issues generally.[90] GTE, too, argues that so long as the GSF rulemaking is pending, inclusion of GSF costs in overheads is permissible.[91]

27. In addition, the LECs defend their overhead loadings. Lincoln responds that the *Expanded Interconnection Order* permits LECs to include reasonable overhead loadings in their collocation rates and, therefore, MFS's position against such loadings is without support.[92] SNET asserts that its proposed tariff does not contain an explicit contribution charge, and that its overhead loading factor represents legitimate costs not specifically accounted for in incremental cost amounts.[93] Moreover, SNET argues, the Commission allows the application of a general overhead loading factor as the ceiling for pricing new services.[94] SNET asserts the methodology it developed, using data from ARMIS, has previously been accepted by the Commission in other new service filings.[95] GTE states that it used overall administrative expense factors obtained from fully distributed annual access charge studies to develop overheads, and that these same factors have been used to develop rates for new services generally.[96] Bell Atlantic replies that it used a consistent overhead loading methodology throughout this filing based on ARMIS data. Bell Atlantic contends that there is no basis for MFS's objection that the LECs did not use loadings based upon comparable services with which the CAPs compete. Bell Atlantic asserts that it proposed such a methodology in its interim tariff but, at the request of the Common Carrier Bureau staff, revised it to conform to the methodology used in the instant filing.[97]

28. BellSouth claims that its overhead loadings are reasonable. BellSouth asserts that although it applied a different approach in developing loadings for expanded interconnection services than it has used with respect to its special access high capacity services, this approach resulted in considerably more modest loading factors for

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78 *Id.* at 26-27.
79 *Id.* at 27.
80 PAC Petition at 1-3, 13-14, 13 n.34.
81 *Id.* at 14-15.
82 Nevada subsequently reduced its DS1 cross-connect rate to $27.19 and its DS3 cross-connect rate to $128.29 from $2,0002.22.
83 Ad Hoc Petition at 25.
84 NYNEX Reply at 7-8; Bell Atlantic Reply at App. A Item 12; SNET Reply at 7-8, Exh. 13.2; GTE Reply at 32, 34-35; US West Reply at 51-53.
85 SNET Reply at 7-8, Exhibit 13.2.
86 NYNEX Reply at 7-8.
87 *Id.* NYNEX
88 US West Reply at 51-53.
89 *Id.* (*citing* Commission Requirements for Cost Support Material to be Filed with 1993 Annual Access Tariffs, 8 FCC Rcd 2306 (Com. Car. Bur. 1993); Bell Atlantic Reply at App. A Item 12 (*citing* same).
90 US West Reply at 53.
91 GTE Reply at 32.
92 Lincoln Reply at 4.
93 SNET Reply at 7-8, Exhibit 13.2. SNET asserts that its overhead loading factor accounts for network support, plant non-specific, customer operations, corporate operations, and general support expenses. *Id.* at 7.
94 *Id.* at 8 (*citing* Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, CC Dkt. No. 87-313, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993); and *Expanded Interconnection Order*, 7 FCC Rcd at 7422).
95 *Id.*
96 GTE Reply at 34-35.
97 Bell Atlantic Reply at App. A Item 12.

expanded interconnection relative to those it employs for its special access high capacity services.[98] BellSouth claims that if it had used the same methodology for its expanded interconnection filing that it employs for its high capacity special access services, it would have been able to justify higher rates. BellSouth thus argues that the Commission should find that its overhead loadings are unreasonably low and direct BellSouth to increase its loadings and rates for expanded interconnection service.[99] SWB claims the rate development process it used caused expanded interconnection rates reflecting the same overhead recovery characteristics as its DS1 and DS3 services. It argues that its overhead loading factors reflect the overhead presently included in its DS1 and DS3 rate levels, and are in line with historical trends.[100] SWB also claims that application of overhead loadings is allowed in the *Expanded Interconnection Order*. Finally, SWB argues, exclusion of overhead costs would require other LEC offerings to recover a proportionally greater share of the costs, and would send false economic signals that could stimulate uneconomic entry into the access market.[101]

29. Pacific argues that it has applied a special access category overhead loading factor of 2.87 percent to each recurring cost element, which is set forth in the workpapers Pacific submitted with its filing. Pacific argues that the method used to develop the factor is not based in any way on special access revenue requirements. According to Pacific, its overhead factor is reasonable, has been applied in a uniform manner, and reflects the same loadings as Pacific uses for new service filings.[102] Ameritech argues that inclusion of overhead loadings is necessary to recover the full cost of providing collocation service, and was authorized by the Commission.[103]

30. US West argues that its overhead loading factor is reasonable. US West developed a loading factor of 1.83 based on its special access category. This factor was applied to the direct costs for the cross-connection rate elements. US West argues that it applied uniform overhead loadings in pricing connection charges.[104] US West also maintains that it used a uniform overhead loading methodology in developing rate elements for maintenance, supplemental humidification, entrance structure, power, and base rent.[105] US West asserts that it applied lower overheads to its Quotation Preparation Fee in anticipation of criticism over the magnitude of the fee. For security escort service, it applied minimum overhead to cover the costs of billing for that service.[106] In addition, US West argues that its expanded interconnection channel termination (EICT) is not comparable to DS1 or DS3 rates for purposes of evaluating overheads. According to US West, EICT charges cover intra-office distances, while DS1/DS3 services can be several miles long; EICT is limited to 144 central offices, while DS1/DS3 service is available throughout US West's service region; each EICT is expected to be purchased in conjunction with a DS1/DS3 channel termination, so that interconnectors can avoid the costs of building their own local loops; and EICT and DS1/DS3 channel terminations are provisioned with different equipment.[107] US West dismisses the interconnectors' complaint that they have fewer services than US West among which to spread overhead costs, and asserts that this is no reason to find US West's overhead loadings to be unreasonable.[108]

31. *Discussion. Overhead Loadings.* The level of expanded interconnection charges is influenced significantly by the LECs' choice of overhead factors. For example, these factors range from 1.64 for Ameritech to 2.42 for Bell Atlantic for the DS1 cross-connect charge.[109] In addition, Teleport's analysis of the expanded interconnection costs for DS1 service[110] presents evidence that overhead factors appear to be a significant reason for the high rates filed by certain companies in comparison with the industry average. Therefore, evaluation of LECs' overhead factors is an important element in determining whether the rates before us are justified.

32. The *Expanded Interconnection Order* cautioned LECs that if they chose to reflect fully distributed cost (FDC) overhead loadings in their rates, the Commission would

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[98] BellSouth Reply at 14.

[99] *Id.* at 17 and Exhibit 1 (BellSouth's showing recalculates costs for floor space, DS1 and DS3 cross-connect elements, and AC and DC power elements using the methodology it uses for special access filings. Using this method, BellSouth calculates a recurring rate of $1192 rather than $931 for the collocation space, and a rate of almost $15, rather than $9, for the DS1 cross-connect).

[100] SWB Reply at 8-9. SWB argues that its overhead amount is understated. It claims that the *Expanded Interconnection Order* denied LECs the option of using non-uniform overhead loadings, which allowed them to include lost overhead resulting from customer migration from an old service to a new service in proposed rates. It contends that additional overhead would otherwise have been included depending upon the channel mileage that would be displaced because the Commission has required expanded interconnection. *Id.* at 10-11 (*citing* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, 7 FCC Rcd 5235, 5235 (1992)).

[101] *Id.* at 9-10.

[102] Pacific Reply at 4-6. Pacific also states that its overhead loadings do not include an allocation of GSF. *Id.* at 6.

[103] Ameritech Reply at 21 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7429 n.291).

[104] US West Reply at 29-30.

[105] *Id.* at 30-31.

[106] *Id.* at 31-32.

[107] *Id.* at 33-34.

[108] *Id.* at 34.

[109] For purposes of this Order, overhead factors are defined as the ratio of price to unit direct cost or total revenue to total direct cost. (Thus, for example, an overhead factor of 1.00 indicates no overheads, and an overhead factor of 2.00 indicates that overheads are equal to direct costs.) For comparison to ARMIS data, and for cross-company comparisons, we defined direct costs as the capital costs (depreciation expense, net return on average investment at 11.25 percent, and income taxes) and maintenance costs associated with investment exclusive of general support facilities and defined overhead costs as all other costs. Likewise, in calculating overhead factors based on ARMIS data, the same set of assumptions was used. Overhead factors for companies that included large amounts of administrative costs as direct costs, for example, were adjusted upward by removing administrative expenses from direct costs and treating them as overheads. These recalibrations were made primarily to make LEC data comparable to ARMIS data and do not reflect the view that direct costs and overheads, as a matter of definition, must consist solely of the items described above.

[110] Teleport's estimates are based on several assumptions, such as the use of 100 DS1s and amortization of nonrecurring charges over 5 years.

compare such loadings to the overhead loadings used for other services and require justification for any differences in overhead loadings.[111] Review of the LECs' overhead factors by comparison to overhead factors derived from 1992 special access ARMIS data reveals that all LECs used overhead factors that either approximated or exceeded the FDC level for the special access category.

33. None of the LECs provide the required justification for these overhead loadings. Although many claim that their overhead factors are derived from various types of special access cost data, virtually none provide any information regarding loadings for special access services, such as DS1 and DS3 services, much less demonstrate comparability or justification for noncomparability.[112] In many cases, LECs did not provide sufficient cost data to determine the overhead factor for a particular rate, or did not provide overhead ratios, contrary to the requirements of the *Part 69 ONA Order*, which directs the LECs to provide overhead ratios as cost support for new services.[113] Nonrecurring charges, in particular, were often inadequately supported. Therefore, based on the record before us, it is impossible for us to find the overhead loadings included by the LECs to be reasonable.

34. Given the LECs' failure to justify their proposed overhead loadings, we will partially suspend their rates to the extent they include overhead loadings for expanded interconnection services that exceed ARMIS FDC levels for special access services. In light of the current record, we believe that the ARMIS overhead levels represent the best currently available verifiable surrogate for overhead loadings for other services. Use of this approach for the interim period will best facilitate the Commission's goal of encouraging competition to the extent that it is economically efficient. Provision of bottleneck facilities at rate levels proposed by the LECs that exceed the average overhead loading levels for the special access category as a whole, (*i.e.*, exceed FDC levels) will unreasonably discourage competitive entry.

35. In addition, we find that the LECs have established rate elements for expanded interconnection specifically to recover costs that would ordinarily be included as FDC overheads on all rates. Cage construction and space charges recover land and building costs, a substantial component of investment and expenses for general support facilities. Electric power charges, service ordering, and application fees, and certain nonrecurring charges recover substantial portions of network operation expenses (power, engineering, network administration and testing costs). Thus, it appears that the LECs are double-recovering these overhead costs, first in stand-alone rate elements and second in overhead loading factors.

36. Therefore, at a minimum, overhead loadings claimed by the LECs should be limited to an FDC level adjusted to eliminate double-counting of overhead costs. Because the LECs have not followed the requirements of the *Expanded Interconnection Order* and have not adequately justified their overheads, rates as filed have not been adequately supported and must be reduced as described below.

37. In order to determine whether the LECs' rates exceed FDC levels less double-counted overheads, we calculated special access loading ratios for each LEC from each LEC's own 1992 ARMIS special access cost data, adjusted to eliminate double-counting for land and buildings and network operations. The adjusted ARMIS overhead factor for each LEC was compared to the LEC's overhead factor for each of its rates, as adjusted for comparability to the ARMIS factor. We calculated a rate adjustment factor (RAF) to adjust downward the LEC's rates to the extent that they reflected an overhead factor higher than the adjusted ARMIS factor.[114] The RAFs for each company and the calculations supporting the RAFs are included in Appendix C.[115]

38. Therefore, we are advancing the effective date for the expanded interconnection tariffs by one day, and partially suspending these rates pending investigation pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). We suspend the entire rate for one day, and for the remainder of the 5-month suspension period we suspend the part of the rate that exceeds the levels justified by the present record. Companies are required to reduce and refile their expanded interconnection rates to the levels resulting from multiplication of their filed rates by the relevant RAFs. We find that this approach is reasonable and will best serve the public interest. The partial rate suspension ordered here may not resolve the issue of excessive overheads. As part of the investigation initiated in this Order, LECs will be required to make additional showings, to be specified in a subsequent designation order. Additional issues regarding rates will be raised in the designation order as well.

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[111] *Expanded Interconnection Order*, para 128.

[112] SWB uses "closure factors" for DS1 and DS3 services, which it claims are comparable to the overhead factors used to price its DS1 and DS3 expanded interconnection services. However, SWB has not shown that the "closure factors" on which SWB relies are equivalent to the overhead factors at issue here. Also, NYNEX argues that expanded interconnection overheads are less than overheads for DS1 and DS3 services. However, this claim is not supported by relevant cost data. BellSouth claims that expanded interconnection overheads are less than overheads for a certain specialized high capacity service. However, the last service may not be representative of most DS1 and DS3 services.

[113] Most LECs varied their overhead factors from rate to rate and did so without explanation, contrary to the requirements of the *Expanded Interconnection Order* and the *Part 69 ONA Order*.

[114] It was necessary for us to compare the LECs' overhead loading factors to the ARMIS levels on a rate element by rate element basis, because in almost all cases, each LEC uses various overhead loading factors for their rate elements. To avoid a possible "peaks and valley" problem (reducing excessive overheads without compensation for overheads below the ARMIS limit), we considered using an average overhead loading factor, but were not able to do so for several reasons. First, there is no reliable demand information that would allow us to weight each rate element correctly. Second, in many cases, the LECs did not provide sufficient cost support to determine the overhead loading factor for several rate elements. As a result, there were insufficient data to compute a reliable average.

[115] For many rate elements, particularly nonrecurring charges, there was a lack of sufficient cost support to compute LECs' overhead factors. As a result, we were unable to compare overheads for these rate elements to ARMIS overheads and determine appropriate disallowances.

39. *GSF Reallocation.* On May 19, 1993, the Commission released a Report and Order amending its Part 69 rules to correct a misallocation of general support facility (GSF) investment and related expenses.[116] The Commission found that the exclusion of common line investment from the formula for allocating GSF investment results in an underallocation of GSF investment to the common line category and an overallocation of such investment to the special access and traffic sensitive categories. The Commission corrected the formula, effective July 1, 1993.

40. As previously discussed, rates filed by the LECs for expanded interconnection reflect overhead loadings that are approximately equal to or above FDC overhead loadings for special access services, based on 1992 data from ARMIS. For those overheads that exceed ARMIS levels, this Order requires LECs to reduce overheads to the levels specified in Appendix C. As a result of the *GSF Order,* however, the 1992 data used to calculate FDC-based overheads overstate overhead loadings for special access because they include the misallocation of GSF costs to special access.

41. Therefore, we are advancing the effective date for the expanded interconnection tariffs by one day, and partially suspending these rates pending investigation pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). We suspend the entire rate for one day, and for the remainder of the 5-month suspension period we suspend the part of the rate that exceeds the levels justified by the present record. The LECs are required to make an additional adjustment to overhead loadings to reflect the Commission's *GSF Order.* We will require LECs to refile expanded interconnection rates to reflect the GSF decrease. Because the *GSF Order* does not take effect until July 1, 1993, we will not require that this adjustment be made when LECs refile rates to reflect this tariff Order prior to the June 16, 1993, effective date of expanded interconnection rates. However, we encourage LECs to make this adjustment immediately, both to minimize rate churn to customers, and to minimize changes in LEC billing systems. Should a LEC choose not to implement the GSF adjustment immediately, we require the adjustment to be made no later than July 16, 1993, to become effective on 5 days' notice. LECs must use the method described in Appendix D to calculate and apply new RAFs reflecting the GSF reallocation.

42. *Direct Costs.* We have found four cases in which companies have miscomputed their direct costs, resulting in a double-recovery of certain costs. This section explains the source of the double-counting, and details the rate cuts which must be made.

43. BellSouth has used an incorrect method to develop its direct costs for the Space Construction rate element. It identified the costs of designing and constructing the cage, including both material and labor costs, to be $36,191.74. BellSouth then applied cost factors to this amount to determine the annual depreciation, return, and income tax expenses to be $6,916.24. It then determined the net present value of these annual expenses at 13.34 percent for 44.7 years to be $51,652.87, and set its rate at $51,660.

44. BellSouth may recover the costs of Space Construction either as an up-front nonrecurring charge, or over the expected life of the service as a recurring charge. However, the costs used to set the nonrecurring charge for Space Construction should not exceed the original cost of building the cage. BellSouth set its rate using inapplicable net present value (NPV) calculations, rounded up to the next ten dollars. We partially suspend BellSouth's nonrecurring charge for Space Construction to its identified direct cost prior to the NPV calculation, rounded to the next ten dollars, or $36,200.00.

45. GTE also appears to have computed its Building Modification nonrecurring charges in the same manner as BellSouth did for its Space Construction elements, *i.e.,* GTE computed the annual costs associated with the investment, and then computed the present value of that annual cost. As with BellSouth's Space Construction rate, the proposed nonrecurring charges are greater than the entire material and labor cost of the building modification. We partially suspend GTE's rates for its Building Modification to the material and labor costs.

46. United also appears to be double-recovering for its installation labor in its conduit space, DS-1 cross connect, and DS-3 cross-connect rate elements. These rates include, as part of their annual costs, the cost of the engineering and installation labor used to put in place the investment used to provide this service, recovered over the estimated location life, which in most cases is five years. United calls this the non-recoverable cost. This labor cost is also recovered as part of the depreciation expense for these rate elements.

47. It is not clear whether United should be allowed to recover this cost over the life of the location, or whether it should be required to recover the cost over the depreciation life reflected in its depreciation expense. However, it is clear that United should not be allowed to recover twice for this expense. Therefore, we partially suspend its rate by the portion of its depreciation expense that recovers this labor cost.

48. Bell Atlantic has used a method to develop its space occupancy rate that assigns excessive costs to this element. To develop this rate, Bell Atlantic first identified geographic location-specific costs for a square foot of office space, using current office space listings such as Black's Guide in urban areas, or on prevailing local rates in suburban and rural areas. Second, it adjusted these rates to reflect the extraordinary costs that distinguish a central office from standard commercial office space, such as higher ceilings, reinforced floors, and additional environmental conditioning for central office equipment. Finally, Bell Atlantic added administrative costs for periodic review of each central office.[117]

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[116] Amendment of the Part 69 Allocation of General Support Facility Costs, CC Dkt. 92-222, FCC 93-238 (rel. May 19, 1993) (*GSF Order*).

[117] US West used a similar method. It used the value of comparable rental space as the cost of the leased physical space reflected in its Base Rent rates. Stating that this cost excludes property taxes and operating costs, it then added these two items to the leased physical space cost to determine the Base Rent rates. However, it is not clear that these two items would be excluded from prevailing rental rates, because property owners in general must pay these costs out of their rental proceeds. We find the record is unclear on whether US West excluded these two costs in determining the value for comparable rental space; we will examine this issue in the investigation.

49. This third step leads to a double-recovery of costs. The prevailing office rental space rates developed in the first step of Bell Atlantic's method already include the overhead costs for the average landlord, including any periodic review the landlord may have to do of its space. Thus, Bell Atlantic's third step will result in double-recovery of this cost.

50. Bell Atlantic has proposed a space occupancy rate of $3.22 per square foot per month. The administration cost included in that rate is $1.17 per square foot per month. We therefore partially suspend Bell Atlantic's space occupancy rate to the difference between these two, or $2.05 per square foot per month.

51. Therefore, we are advancing the effective date for the expanded interconnection tariffs by one day, and partially suspending these rates pending investigation pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a). We suspend the entire rate for one day, and for the remainder of the 5-month suspension period we suspend the part of the rate that exceeds the levels justified by the present record. The specific allowances for each rate element of each LEC are found in Appendix C. We believe this approach is reasonable and will best serve the public interest. The partial rate suspension ordered here may not resolve the issue of direct costs. As part of the investigation initiated in this Order, LECs will be required to make additional showings, to be specified in a subsequent designation order. Additional issues regarding rates will be raised in the designation order as well.

C. Tariff Filing Requirements

1. Physical Collocation

52. *Pleadings.* PUCO complains that GTOC should have filed tariffs providing for physical collocation for its Ohio central offices despite GTOC's request for exemption from physical collocation on the basis of state policy. PUCO states while it has adopted a formal position favoring LEC choice, and thus tentatively supports GTOC's request for exemption from mandatory physical collocation, a significant consideration in support of its decision was the expected filing of physical collocation tariffs.[118] GTE responds that it misread the Ohio order on collocation and will file interstate physical collocation for Ohio.[119]

53. In addition, a number of petitioners fault the use of ICB pricing in certain LECs' physical collocation tariffs. MFS charges that the proposals of Bell Atlantic, Centel, and US West to construct collocation cages on an ICB basis violate the *Expanded Interconnection Order*.[120] Teleport, Ad Hoc, and MCI make the same charge with respect to Bell Atlantic and US West;[121] PAC with respect to Bell Atlantic;[122] and PUCO with respect to United.[123] MFS and PAC assert the *Expanded Interconnection Order* requires tariffing of charges for the labor and material necessary to establish collocation arrangements.[124]

54. MCI dismisses the LECs' argument that ICB rates are necessary because collocator preferences will be highly individual. MCI argues that the solution is to offer a standard type office construction element and allow for variations based on additional labor and materials at tariffed rates for such services. MCI alleges that if these LECs' tariffs are permitted to take effect as filed, interconnectors will be severely inhibited from interconnecting with them.[125] MFS urges the Commission to reject all ICB pricing provisions for cage construction.[126]

55. Rochester and Bell Atlantic respond that the construction costs associated with making space ready for interconnectors to occupy are not susceptible to a uniform tariffed rate because they depend on the amount, location, and configuration of the interconnector's space.[127] Rochester asserts that it will charge for such work based upon its tariffed time and materials rates, and that the Commission did not mandate that such charges be tariffed.[128]

56. United asserts that it filed a time and materials rate provision for central office buildout which offers customers the option of using a third party contractor satisfactory to both parties.[129] United asserts that this provision is reasonable because: fixed construction rates are unavailable and so tariffing a fixed rate would place the burden on United rather than on the prospective interconnector; labor and material cost to United is uncertain; cage design is not standardized; and allowing a customer to choose the contractor to construct the cage removes the ability of United to improperly inflate the cage construction price. United asserts that PUCO's objections to time and materials rate provisions should therefore be rejected.[130]

57. US West argues that its ICB rate structure benefits the interconnector because it allows for the most customization of space and achieves the most cost efficiencies possible for the interconnector.[131] US West notes that many factors may vary from interconnector to interconnector including entrance structure requirements (*e.g.*, number of fibers), placement of the leased physical space in relation to the central office vault (*i.e.*, the number of floors separating the leased space from the entrance structure), amount of space, type of enclosures, power levels and related air conditioning requirements, and humidi-

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118 PUCO Petition at 5.

119 GTE Reply at 25. We note that GTOC has not yet filed physical collocation tariffs for Ohio.

120 MFS Petition at 30 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7442), 45.

121 Teleport Petition at App. A Item 22; MCI Petition at 7; Ad Hoc Petition at 15-17. Teleport further asserts that notwithstanding Bell Atlantic's use of an ICB rate structure, it nonetheless includes a provision allowing it to charge even more in the event it experiences "extraordinary costs." Teleport Petition at App. A Item 22.

122 PAC Petition at 12.

123 PUCO Petition at 6.

124 PAC Petition at 12-13 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7442); MFS Petition at 30 (*citing* same).

125 MCI Petition at 7-8.

126 MFS Petition at 30-31.

127 Rochester Reply at 4-5; Bell Atlantic Reply at App. A Item 3.

128 Rochester Reply at 5-6 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7442, ¶ 158).

129 United/Centel Reply at 8-9. United adds it proposes to bill environmental support construction on a time and materials basis. *Id.* at 9 n.21.

130 *Id.* at 9-11.

131 US West Reply at 41.

fication levels. US West contends that these factors make ICB rates preferable to generally averaged rates.[132] US West argues that discrimination would be minimized by filing of ICB rates at the conclusion of negotiations, so that other interconnectors may take the same rates in similar circumstances.[133] US West asserts that ICB rates are appropriate because it has no prior experience offering expanded interconnection, and expects to file generally averaged rates after it gains further experience with offering expanded interconnection.[134]

58. *Discussion.* The *Expanded Interconnection Order* requires that physical collocation be offered[135] except where exemptions have been requested by a LEC and granted by the Commission on the basis of space exhaustion[136] or state policy grounds.[137] State-based exemption requests were to be submitted by the date for filing the interstate expanded interconnection tariffs required by the *Expanded Interconnection Order*. After the filing of these tariffs, exemption requests based on state policy grounds were no longer permitted to be filed.[138]

59. GTE's tariff contains a provision permitting it to exempt itself from the provision of physical collocation, for state policy reasons, on an ongoing basis, without requesting an exemption from, and being granted an exemption by, the Commission. This provision violates the requirements of the *Expanded Interconnection Order*. Accordingly, GTE, and any other carrier with a similar provision, is required to delete this provision from its tariff. At most, a carrier can state in its tariff that physical collocation will not be provided in states for which the Commission has granted its state policy exemption requests.

60. The *Expanded Interconnection Order* also requires that general terms and conditions for physical collocation be tariffed, and that the cross-connect element and any future contribution charge be provided pursuant to generally available tariffs at study area-wide averaged rates.[139] The *Expanded Interconnection Order* states that since these elements will be fairly standard, there is no need for the greater flexibility that is possible with use of individually negotiated tariff provisions.[140] In addition, the *Expanded Interconnection Order* states that while charges for certain other connection elements may reasonably differ by central office due to variations in cost, they should be uniform for all interconnectors in each individual office. For physical collocation, these charges include central office floor space rental; labor and materials charges for initial preparation of office space; power, environmental conditioning, and use of riser and conduit space.[141] Thus, the *Expanded Interconnection Order* states that if different physical interconnection arrangements require different amounts of time to construct, the buildout fee charged to the interconnectors could be different, provided the hourly labor charges for each type of worker are uniform.[142] In short, the *Expanded Interconnection Order* permits uniform per unit pricing for some physical collocation rate elements, but does not permit ICB pricing for physical collocation rate elements.

61. Lincoln,[143] Centel, Bell Atlantic, and US West tariff some, and in some cases virtually all, of their physical collocation rate elements on an ICB basis. Accordingly, these LECs, and any other LEC who has tariffed physical collocation rate elements as an ICB, are ordered to delete references to ICB charges from their physical collocation tariffs and tariff either specific rates or time and materials charges for those rate elements.

2. Virtual Collocation

62. *Pleadings.* Ad Hoc and MCI assert that the *Expanded Interconnection Order* mandates that all LECs must tariff virtual collocation offerings, both as an option to physical collocation which the interconnector may select at its discretion, and as a mandatory alternative where physical collocation is legitimately unavailable.[144] They contend that the LECs are not permitted to refuse to provide virtual collocation in central offices where they provide physical collocation. They also assert that the LECs must file tariffs specifying rates, terms, and conditions of virtual collocation, and may not merely state that virtual collocation is available pursuant to ICB prices reached through negotiations.[145] Ad Hoc and MCI thus assert that the tariffs of several LECs -- including Bell Atlantic, BellSouth, NYNEX, SWB, US West, Pacific, Nevada, and SNET -- are too restrictive because they only offer virtual collocation in offices where space has been exhausted or where they have requested exemptions based on state policy.[146]

63. Sprint asserts that the *Expanded Interconnection Order* states that virtual collocation *must* be provided where space for physical collocation is exhausted. Sprint therefore argues that US West's provision that virtual collocation *may* be available upon space exhaustion in a given central office contradicts this requirement and must be removed.[147] Sprint also argues that when ICBs are negotiated for virtual collocation arrangements, not only the agreement, but the name of the customer and the location

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[132] *Id.* at 41-42.
[133] *Id.* at 42.
[134] *Id.* at 43-44.
[135] *Expanded Interconnection Order*, 7 FCC Rcd at 7390.
[136] *Id.* at 7390-91, 7407-08, 7408 n.191. The *Exemption Order* rules on the LECs' space exemption requests and requires the filing of physical collocation tariffs where such requests have been denied.
[137] *Id.* at 7391. The *Exemption Order* rules on the LECs' state policy exemption requests and requires the filing of physical collocation tariffs where such requests have been denied.
[138] *Id.*
[139] The *Expanded Interconnection Order* found that a contribution charge was not warranted at this time. *Expanded Interconnection Order*, 7 FCC Rcd at 7436-39 (finding that correcting underallocation of general support facilities to common line would remedy the only grounds for a contribution charge identified in the record). *See also GSF Order, supra*, note 114.
[140] *Expanded Interconnection Order*, 7 FCC Rcd at 7442.
[141] *Id.*
[142] Similarly, buildout charges paid by interconnectors would vary based on the type and quantity of materials used.
[143] We consider Lincoln to have an ICB rate because its Application Fee of $7,500 will be adjusted to reflect the actual cost of the service preparation and cable installation.
[144] Ad Hoc Petition at 42-46; MCI Petition at 4-5. *See also* WilTel Petition at 1-3 ("acknowledging" that the *Expanded Interconnection Order* is ambiguous on this requirement).
[145] Ad Hoc Petition at 42-46; MCI Petition at 4-5; Teleport Petition at App. A Item 3.
[146] Ad Hoc Petition at 42-43; MCI Petition at 5.
[147] Sprint Petition at 14-15.

of the virtual interconnection, should be tariffed. Sprint claims that there is precedent for provision of the customer name for ICBs for special access service, and that this is necessary to avoid any potential anticompetitive pricing among the various interconnectors.[148]

64. The responding LECs dispute petitioners' allegations. BellSouth asserts that the Commission's requirements concerning filing virtual collocation offerings and providing collocators with a choice of either physical or virtual collocation are unclear.[149] Other LECs assert that they are not required to: offer virtual collocation at the interconnector's option;[150] provide virtual collocation where physical collocation is available;[151] or tariff virtual collocation until they receive a *bona fide* request.[152] They assert that the *Expanded Interconnection Order* says only that the LEC and the interconnector are free to negotiate virtual arrangements if they are preferable to both parties, so long as they are tariffed and made generally available.[153] SWB states that if negotiation of a virtual collocation agreement results in the development of ICB rates and charges, then a case filing must be made in the tariff. SWB argues that if such a filing is mandated, it should be allowed to recover the $490 filing fee associated with such a filing and that other filings should not be mandated.[154]

65. In addition, several petitioners argue that the LECs have made excessive use of ICB pricing in their virtual collocation tariffs[155] and that this is contrary to the Commission's intent in the *Expanded Interconnection Order*. Ad Hoc, MFS, MCI, ALTS, and WilTel argue that the LECs are required to file tariffed rates for all standard elements of virtual collocation. They further contend that the LECs are only permitted to engage in individual case basis negotiations with respect to equipment, and that the terms of such ICB arrangements must then be filed under tariff and made available to similarly situated customers.[156]

66. MFS and MCI assert that the extensive use of ICB pricing poses the threat of discriminatory pricing or excessive rates.[157] MFS contends that this could cause extensive ad hoc litigation of individual rate proposals.[158] MFS also asserts that ICB pricing is being used by the LECs to disguise excessive and unreasonable rates. To illustrate, MFS claims that Bell Atlantic's tariff proposes to price the costs of training Bell Atlantic personnel to work on a virtually collocated interconnector's equipment as an ICB, but in its interim collocation tariff, Bell Atlantic identifies training costs of $28,000 per collocation arrangement.[159] MCI asserts that extensive use of ICB pricing inhibits the availability of rate information for interconnectors. MCI argues that this will dampen competition by making the financial decision-making process of collocation more difficult.[160]

67. MFS urges the Commission to require the LECs to file supplemental materials, and to allow interested parties to submit additional comments on those materials on an expedited basis.[161] MCI requests that these LECs be required to amend their tariffs to specify, at minimum, the following rate elements: cross-connect, floor space rental, entrance and riser fees for cables, splicing and testing fees, cable pulling fees, order and design charges, and any standard labor and material rates that might be used for specializing any virtual arrangements.[162]

68. Most of the responding LECs assert that: the *Expanded Interconnection Order* does not require them to tariff rates for virtual collocation;[163] that ICB pricing is justified;[164] and that there is no potential for discriminatory pricing of virtual collocation service because they are required to tariff each arrangement.[165] Some say they would be willing to tariff most rates, terms, and conditions for virtual collocation. For example, BellSouth asserts it is prepared to file with the Commission a virtual collocation arrangement which would include all relevant terms, conditions and charges for virtual collocation except for those associated with obtaining and installing customer selected central office equipment. It states it would negotiate the charges, including training costs to be borne by the interconnector, then file them in the tariff.[166]

69. United and Centel contend that they have included ICB prices for all but the cross-connect element and the application fee for virtual collocation. They assert that included in their equipment ICB rate element price would be costs for floor space, cable, and labor. United

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148 *Id.* at 15-16.

149 BellSouth Reply at 36-37.

150 Lincoln Reply at 2 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7396); SNET Reply at 1-2.

151 Lincoln Reply at 2; Nevada Reply at 3 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7390); United/Centel Reply at 3-4 (*citing* same); Pacific Reply at 29-30. Bell Atlantic asserts that this is a policy matter that is outside the scope of this proceeding. Bell Atlantic Reply at App. A Item 26.

152 Lincoln Reply at 3-4 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7489-90, and Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 8 FCC Rcd 127, 128-29 (1993).

153 Nevada Reply at 3 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7390); SNET Reply at 2 (*citing* same); SWB Reply at 33-34; US West Reply at 53-55; CBT Reply at 2-4.

154 SWB Reply at 30.

155 MCI claims that these LECs are: NYNEX, Lincoln, Rochester, Cincinnati, Nevada, Pacific, SWB, US West, BellSouth, GTOC, GSTC, SNET, United, and Centel. MCI Petition at 8 n.14.

156 MFS Petition at 31-32; WilTel Petition at 1-6; MCI Petition at 5-6, 8-9; Ad Hoc Petition at 43-44; WilTel Petition (Bell Atlantic) at 1-3; ALTS Petition at 15.

157 MFS Petition at 32; MCI Petition at 6-7.

158 *Id.*

159 MFS Petition at 32.

160 MCI Petition at 6.

161 MFS Petition at 32.

162 MCI Petition at 8. MCI states that it although the use of floor space might be minimal under virtual collocation, it still believes a standard tariff charge is appropriate. *Id.* at n.13.

163 Lincoln Reply at 2.

164 Bell Atlantic Reply at App. A Item 18; Pacific Reply at 30-31. Bell Atlantic replies that it used ICB pricing for training its employees on the use of virtually collocated equipment because the amount and cost could vary widely depending on the type of equipment installed, the familiarity of Bell Atlantic's employees with such equipment, the price the vendor charges for the training, whether the CAP can or will train Bell Atlantic's employees, and the number of training hours. Bell Atlantic Reply at App. A Item 18.

165 Lincoln Reply at 2-3.

166 BellSouth Reply at 36-37.

and Centel assert that they do not object to disaggregating the equipment ICB into various components that reflect the same charge as physical collocation for floor space rental, labor, and cable space. They claim that disaggregating the ICB rate element in this manner would leave equipment costs as their sole ICB item. United and Centel assert that even MCI acknowledges that the use of floor space might be minimal under virtual collocation, and thus the benefits from removing this item from the ICB price will be minimal, if any.[167] SWB states that Section 25 of its tariff provides for both physical and virtual collocation, and that users should assume that rate elements not specifically designated as applying only to physical collocation may apply to virtual collocation as well.[168] GTE argues that its tariff identifies terms and conditions that apply to virtual arrangements, and that rates would be developed on a case-by-case basis. Once developed, GTE states, all customers using virtual in a particular office would pay those rates.[169]

70. *Discussion.* The *Expanded Interconnection Order* requires that virtual collocation tariffs be filed in four instances: in all study areas where virtual collocation is available on an intrastate basis;[170] throughout all study areas where a LEC has negotiated an interstate virtual collocation arrangement;[171] and, as noted *supra*, in those central offices that are exempted from physical collocation on the bases of space exhaustion[172] or state policy.[173] The *Expanded Interconnection Order* specifically notes that these requirements might result in a LEC being required to offer both physical and virtual collocation in some offices, but states that the public interest benefits make this a beneficial result.[174] Further, while the *Expanded Interconnection Order* only mandates the provision of virtual collocation service under these four circumstances, it does not contemplate exempting LECs from providing virtual collocation in those mandated circumstances.[175] The *Expanded Interconnection Order* requires that specific rates, terms, and conditions for virtual collocation be tariffed and generally available, with the exception of equipment dedicated to a virtual collocator's use. The rates, terms, and conditions of such equipment's provision may be individually negotiated, so long as they are subsequently tariffed and made generally available.[176] Finally, the *Expanded Interconnection Order* permits individually negotiated virtual arrangements anytime they are preferable to physical collocation from the point of view of both parties.[177] Once negotiated, however, they must be tariffed and made generally available.[178]

71. Pursuant to the *Expanded Interconnection Order*, a number of LECs are required to file virtual collocation tariffs. Several of those LECs, however, did not. Pacific should have tariffed virtual collocation because it has an intrastate virtual collocation arrangement. Accordingly, Pacific is required to file a tariff offering virtual collocation to the same extent that it has tariffed physical collocation.[179] BellSouth, GTE, United, CBT, and Centel should have filed virtual collocation tariffs because they requested exemptions from the *Expanded Interconnection Order*'s physical collocation requirements on the basis of state policy and/or space exhaustion grounds. In the *Exemption Order*, we require these five LECs to file virtual collocation tariffs for those offices or states for which exemptions have been granted. The tariffs filed by these six LECs must specify the rates, terms, and conditions on which they will offer virtual collocation, and must not contain any reference to ICB pricing, except for the equipment dedicated to the virtual collocator.

72. Of the carriers that were required to and did file virtual collocation tariffs, Bell Atlantic and US West include ICB rates for items other than equipment dedicated to the virtual collocator. Accordingly, these LECs are ordered to delete any references to ICB pricing, with the exception of the equipment dedicated to the virtual collocator, and replace them either with specific rates or time and materials charges.

73. In addition, some LECs who are not yet required to file virtual collocation tariffs nonetheless stated in their tariffs that they would offer virtual collocation upon *bona fide* request or on an ICB basis. As noted *supra*, under the *Expanded Interconnection Order*, a LEC always has the option of providing virtual collocation in addition to physical collocation.[180] Thus, we will permit LECs who are not yet required to file virtual collocation tariffs, to tariff an offer to file such tariffs upon *bona fide* request. Once a virtual collocation agreement is negotiated, however, it must be tariffed and made generally available pursuant to the *Expanded Interconnection Order*. Finally, any virtual collocation tariff which a LEC is required to file at a later date, for the reasons noted in the *Expanded Interconnection Order*, must specify the rates, terms, and conditions on which the LEC will offer virtual collocation, and must not contain any reference to ICB pricing, except for the equipment dedicated to the virtual collocator.

74. Finally, US West's tariff contains two provisions conditioning its offering of virtual collocation on the availability of space and facilities. The *Expanded Intercon-*

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167 United/Centel Reply at 2-3.
168 SWB Reply at 33.
169 GTE Reply at 23-24.
170 *Expanded Interconnection Order*, 7 FCC Rcd at 7490.
171 *Id.*
172 *Id.* at 7390, 7407-08.
173 *Id.* at 7391. The *Expanded Interconnection Order* states that state-based exemption requests are to be accompanied by the virtual collocation tariffs that the LEC would implement should its state exemption request be granted. *Id.* at 7491.
174 *Expanded Interconnection Order*, 7 FCC Rcd at 605.
175 Rules may be waived, however, if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In the *Exemption Order*, we grant some waivers of the Commission's virtual collocation requirement.
176 *Expanded Interconnection Order*, 7 FCC Rcd at 7442-43.
177 *Id.* at 7390.
178 *Id.* at 7490.
179 *Expanded Interconnection Modification Order, supra*, note 2.
180 *Expanded Interconnection Order*, 7 FCC Rcd at 7390. A LEC is always free to negotiate, and then tariff and make generally available, a virtual collocation arrangement with an interested interconnector. Such tariffs, by definition, would include all rates, terms, and conditions.

nection Order did not contemplate LECs' being exempted from the provision of virtual collocation. Accordingly, such provisions are not acceptable. Rather, the appropriate procedural vehicle is for a LEC to request a waiver of the *Expanded Interconnection Order*'s virtual collocation requirements on the grounds of space exhaustion if and when warranted.[181] Accordingly, US West is required to delete from its tariff the provisions conditioning its offering of virtual collocation on the availability of space and facilities.

3. Microwave Collocation

75. *Pleadings.* ALTS asserts that the majority of LECs have not tariffed rates, or all relevant terms and conditions, applicable to microwave collocation in direct contradiction to the *Expanded Interconnection Order.*[182] ALTS argues that the LECs should be required to file supplemental tariff provisions governing microwave collocation on a highly expedited schedule with an opportunity for comment by interested parties.[183] PUCO also asserts that tariffs of GTE, CBT, and Ameritech are deficient because they fail to provide tariff provisions for microwave facilities except upon bona fide request and then only on an ICB basis.[184]

76. BellSouth asserts that all its expanded interconnection provisions pertain to microwave collocation, although its tariff indicates that additional terms and conditions may also apply.[185] Rochester responds that claims that it must tariff microwave collocation now are incorrect.[186] SWB contends that the *Expanded Interconnection Order* requires microwave transmission facilities to be tariffed only where reasonably feasible.[187] CBT, GTE, Bell Atlantic, Rochester, and others assert that they will tariff microwave interconnection upon *bona fide* request.[188]

77. Bell Atlantic, BellSouth, and SWB argue that the technical feasibility of interconnecting microwave facilities is costly and case-specific, and the factors involved are much more complex and variable than those involving fiber collocation, so that microwave interconnection can only be tariffed on an individual case basis.[189] NYNEX replies that it plans to price the NRCs for the provision of microwave antenna support structures and associated transmitter/receiver space on an ICB basis because the costs vary greatly depending on the specific customer's needs.[190] Ameritech claims the *Expanded Interconnection Order* allows LECs to offer microwave interconnection on an ICB basis, so no tariff is required. It asserts, however, that it will tariff different aspects of microwave interconnection as it gains experience in offering microwave interconnection.[191]

78. *Discussion.* The *Expanded Interconnection Order* requires that microwave interconnection (physical and virtual) be offered where reasonably feasible. The *Expanded Interconnection Order* also states that, *inter alia*, the tariffing, rate structure, and pricing rules adopted therein will generally apply to microwave interconnection.[192] Except for NYNEX, Centel, US West, and United, microwave tariffs are limited to statements that the LECs will offer microwave collocation as an ICB. However, NYNEX tariffs NRCs for provision of antenna support structures and associated transmitter/receiver space as an ICB offering, and US West has only tariffed one element, a quotation preparation fee, the level of which is being contested as too high.

79. We are persuaded by the record in this tariff proceeding that microwave interconnection is sufficiently interconnector-specific to warrant tariffing as an ICB offering. LEC arguments that microwave interconnection does not readily lend itself to uniform tariff arrangements are not contested by interconnectors. Of equal significance, many LECs have tariffed a provision requiring them to provide microwave collocation upon *bona fide* request, as an ICB. We will grant a blanket waiver of the tariffing requirements for microwave collocation contained in the *Expanded Interconnection Order,* pending reconsideration of the rulemaking,[193] to permit tariffing on an ICB basis in response to *bona fide* requests. Any LEC that has not yet done so is required to tariff an offer to provide microwave interconnection where reasonably feasible upon *bona fide* request, and to tariff any individually negotiated agreements and make them generally available in that office.

D. Terms and Conditions

1. Collocation in Leased Offices

80. *Pleadings.* Ad Hoc argues that US West's blanket provision that expanded interconnection will not be available where its central office space is leased from a third party, without any showing that collocation would violate specific lease terms, could wholly defeat the *Expanded Interconnection Order* to the extent that central offices are leased by the LECs.[194] TDL and ALTS also object to this provision of US West's tariff. They argue that interconnection facilities should be provided by US West if potential interconnectors obtain sublease consent from lessors, and that US West should not be allowed to prevent or obstruct such sublease arrangements.[195] TDL also claims that US West has entered into leaseback arrangements to thwart the purposes of expanded interconnection,[196] while

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[181] In the *Exemption Order,* we grant US West a waiver of the virtual collocation requirement for one central office.

[182] ALTS Petition at 17 (*citing Expanded Interconnection Order,* 7 FCC Rcd at 7416).

[183] *Id.*

[184] PUCO Petition at 6-7.

[185] Bellsouth Reply at 37-38.

[186] Rochester Petition at 3-4 (*citing Expanded Interconnection Order,* 7 FCC Rcd at 7489-90; and *Expanded Interconnection Modification Order,* 8 FCC Rcd at 128-29.

[187] SWB Reply at 43.

[188] GTE Reply at 22-23; CBT Reply at 5-6; Bell Atlantic Reply at App. A Item 22; Rochester Reply at 4.

[189] BellSouth Reply at 37-38; SWB Reply at 43; Bell Atlantic Reply at App. A Item 22.

[190] NYNEX Reply at 9 n.18.

[191] Ameritech Reply at 40.

[192] *Expanded Interconnection Order,* 7 FCC Rcd at 7416.

[193] GTE and USTA have raised this issue in their petitions for reconsideration of the *Expanded Interconnection Order.*

[194] Ad Hoc Petition at 29 n.62.

[195] TDL Petition at 6-7; ALTS Petition at App. D p.5.

[196] TDL Petition at 6-7.

ALTS expresses concern that this provision would permit a LEC to transfer its central office properties to an affiliate for this purpose.[197]

81. US West responds that it should not be required to seek permission from parties from whom it rents central office space to allow collocation at those central offices. US West argues that most lessors would be reluctant to allow subleasing. In addition, US West maintains that lessors would usually require interconnectors to comply with the terms of US West's lease, which may not be consistent with US West's expanded interconnection tariff.[198] US West also argues that the lessor might require additional maintenance or security arrangements, or restrict hours of access.[199] US West contends that some lessors might require US West to remain liable for any lease violations.[200] Finally, US West argues that interconnectors could approach lessors directly to lease central office space, but this would not fall within the definition of physical collocation.[201]

82. Ameritech claims that it does not have a blanket prohibition on collocation requests for leased space; rather, its tariff states that requests under those circumstances are subject to review and approval of the landlord. It asserts it will use its best efforts to obtain permission from the landlord to allow collocation.[202]

83. *Discussion.* US West states in its tariff that collocation will not be provided in leased central office space; NYNEX and Bell Atlantic state that collocation, and Ameritech states that physical collocation, in leased central offices is subject to landlord approval.[203] The *Expanded Interconnection Order,* however, does not provide for exemption from the requirement to provide physical collocation merely because a central office is leased, rather than owned, by a LEC. The provision of floor space for physical collocation is part of the provision of a communications service, not a sublease of space in the traditional sense. Because these tariff provisions violate the *Expanded Interconnection Order,* these LECs are required to delete such provisions from their tariffs.

84. We will, however, consider requests for waiver of the *Expanded Interconnection Order*'s requirement to provide physical collocation if an office is leased by a LEC under certain circumstances. Such waivers will be granted for offices leased on or prior to the release date of the *Expanded Interconnection Order* only if the LEC can prove it made a good faith effort to secure the landlord's agreement and meets all other standards for grant of waiver. For offices leased subsequent to the *Expanded Interconnection Order*'s release date, after which the LECs were on notice that expanded interconnection was required, we will grant waivers only in the most extraordinary circumstances. A related ground for waiver, regardless of when the lease was signed, is if the office is leased from a U.S. government agency and that agency does not consent to provision of physical collocation. Should we grant a waiver request, the LEC will be required to provide virtual collocation in the leased office. Waiver requests will be denied absent truly extraordinary circumstances where a LEC leases offices from a corporate affiliate of any kind, another LEC, or another LEC's corporate affiliate, regardless of when the lease was signed. Requests to waive the provision of virtual collocation in leased offices will be granted on the same basis as requests to waive provision of virtual collocation in owned offices, *i.e.,* only if the LEC has proven that there is insufficient space to provide virtual collocation.[204] Waiver of virtual collocation is not justifiable on the ground that the office is leased by the LEC because virtual collocation does not require permitting third-party access to LEC premises.

2. References to Outside Agreements

85. *Pleadings.* Ad Hoc and MFS object to the provisions in the tariffs of Pacific, Ameritech, Centel, and other LECs requiring interconnectors to enter into separate contracts or licensing agreements as a prerequisite to physical collocation. They argue that these arrangements would result in terms and conditions of service not being provided under tariff as required by the Commission,[205] and present potential for ambiguity and conflict between tariff terms and contract provisions.[206]

86. Pacific defends its practice of requiring a non-tariffed Collocation License Agreement that in part operates to govern the occupation of space by the collocator. According to Pacific, the agreement contains provisions related to the occupancy of real estate, permits state judicial procedures to be used to evict a former interconnection customer, and defines the relationship between interconnectors and Pacific if the expanded interconnection requirements are overturned on appeal. Pacific further argues the agreement is part of the public record.[207]

87. Nevada claims Ad Hoc's objection to its license agreement is unfounded.[208] It claims its license agreement is a commercial real estate agreement consisting of standard terms and conditions governing the parties' duties. It asserts that the *Expanded Interconnection Order* does not forbid a LEC from entering into a commercial agreement with a customer that is consistent with terms in a tariff. It contends that the terms of the license agreement are consistent with the terms found in Section 18 of its expanded interconnection tariff. Further, it adds, customers ordering special construction arrangements under Section 12 of its tariff also enter into detailed contracts covering new construction.[209]

88. United and Centel similarly object to the MFS and Ad Hoc opposition to the use of landlord-tenant agreements.[210] They assert that Centel's Standard Agreement contains items that are consistent with normal landlord-

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197 ALTS Petition at App. D p.5.
198 US West Reply at 21-22.
199 *Id.* at 22-23.
200 *Id.* at 23.
201 *Id.* at 23-24.
202 Ameritech Reply at 37.
203 US West, NYNEX, and Bell Atlantic do not specify whether they are referring to physical collocation only or both physical and virtual collocation.
204 *See* Section III.C.2., *supra.*
205 Ad Hoc Petition at 41-42; MFS Petition at 45.
206 Ad Hoc Petition at 42.
207 Pacific Reply at 32.
208 Nevada Reply at 12.
209 *Id.* at 12-13.
210 United/Centel Rely at 23-25.

tenant relationships, such as access to restroom facilities, use of keys, and cleanliness of collocation space. They claim the agreement is used to avoid placing items in the tariff that are not central to providing expanded interconnection service. They offer to provide the Commission with access to those contracts if requested.[211]

89. *Discussion.* United and Centel reference outside agreements in their tariffs. US West's tariff refers to the potential to bind collocators to as yet nonexistent outside agreements pertaining to cable, equipment, and construction standards. Pacific and Nevada have filed tariff revisions deleting references to outside agreements from their tariffs. Section 61.74 prohibits carriers from referencing outside agreements in their tariffs without special permission. No LEC has requested such a waiver and we decline to grant special permission for any LEC to reference an outside agreement. To ensure certainty concerning the terms for expanded interconnection, and even-handed treatment of all interconnectors, collocation is to be governed by the four corners of the tariff. Accordingly, United, Centel, US West, and any other carriers that reference outside agreements in their tariffs, are required to delete any references to outside agreements from their tariffs.

3. Entry Points

90. *Pleadings.* Sprint asserts that the offering of two entry points to a single central office is critical to ensuring that the interconnector can provide its customers with immediate restoration of service in the event of a fiber cut or other occurrence that would interrupt service. Sprint notes that some, but not all, LECs have tariffed two entry points, and that the Commission should require those LECs that have not done so to tariff two entry points where available.[212] SWB responds that it does not object to Sprint placing fiber in two different entrances into its space provided Sprint provides the cable and pays for any extraordinary costs that occur.[213]

91. *Discussion.* The *Expanded Interconnection Order* requires LECs to provide at least two separate points of entry to a central office where, and only where, there are least two entry points for LEC cable.[214] The *Expanded Interconnection Order* also states that a LEC need not offer more than two entry points for interconnectors even if it has additional points for its own facilities.[215] All the LECs now tariff the availability of two entry points in such circumstances. GTE has tariffed the availability of two entry points except where one of the two entry points is at capacity, in which case an interconnector would only be entitled to one entry point. The *Expanded Interconnection Order* does not address such instances. However, we find that, where a LEC has two or more entry points, and all but one are at capacity, it would be unreasonable to require the LEC to rearrange its facilities to permit an interconnector access to two entry points until we have had an opportunity to consider this issue on reconsideration. Therefore, we will grant a blanket waiver, pending reconsideration of the rulemaking,[216] for any central office where such circumstances exist, so that a LEC is permitted to provide only one entry point.

4. Collocated Equipment

92. *Pleadings.* MFS asserts that Ameritech, Bell Atlantic, GTE, and US West appear to exclude digital access and cross-connect systems (DACS) from the approved equipment that can be used in the customer's interconnection space. While MFS acknowledges that the *Expanded Interconnection Order* requires CAPs to use a DS1 or DS3 for interconnection with the LEC network, it argues that there is no technical reason for LECs to specifically exclude equipment such as DACS that does not affect the form of interconnection but allows the network to be used for maximum efficiency.[217] Ad Hoc and Teleport contend that the provisions in the tariffs of NYNEX, Ameritech, Pacific, BellSouth, Bell Atlantic, and US West restricting interconnector equipment to the specific items listed in the tariffs are unduly restrictive and unnecessary. Ad Hoc and Teleport request that these tariffs be revised to comply with the *Expanded Interconnection Order* and permit all central office equipment that can be used to terminate basic transmission facilities.[218]

93. Bell Atlantic replies that the equipment restrictions in its tariff are consistent with the *Expanded Interconnection Order*'s requirement that only transmission equipment used to terminate DS1 and DS3 special access services may be collocated.[219] Bell Atlantic contends that Teleport's proposal would allow additional types of equipment and is therefore inconsistent with the *Expanded Interconnection Order.* Bell Atlantic states that its tariff permits "DACS" equipment to be collocated because DACS is merely a particular brand of optical line multiplexing equipment.[220] NYNEX replies that its tariff permits interconnectors to locate within its central offices their central office transmission equipment, *i.e.*, OLTMs, central office multiplexers, digital cross-connect systems, repeaters, and ancillary equipment. NYNEX contends that these restrictions are consistent with the requirements of the *Expanded Interconnection Order,* which limits collocated interconnector equipment to that "needed to terminate basic transmission facilities."[221]

94. BellSouth also responds to concerns about the type of transmission equipment an interconnector could place in its collocation space.[222] BellSouth claims Teleport's proposed tariff language is overly broad as it would encompass enhanced service equipment and switching equipment that it asserts was specifically excluded by the *Expanded Interconnection Order.* However, BellSouth as-

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211 *Id.*
212 Sprint Petition at 18.
213 SWB Reply at 45.
214 *Expanded Interconnection Order,* 7 FCC Rcd at 7411.
215 *Id.* n.210.
216 USTA raises this issue in its petition for reconsideration of the *Expanded Interconnection Order.* MFS opposes USTA's position.
217 MFS Petition at 39. *See also* Teleport Petition at App. A Item 31.
218 Ad Hoc Petition at 35; Teleport Petition at App. A Item 31.
219 Bell Atlantic Reply at App. A Item 14 (*citing Expanded Interconnection Order,* 7 FCC Rcd at ¶ 93).
220 Bell Atlantic Reply at App. A Item 14.
221 NYNEX Reply at 28 (*quoting Expanded Interconnection Order,* 7 FCC Rcd at ¶ 93).
222 BellSouth Reply at 34-35.

serts it is willing to modify its tariff to state that the equipment Teleport enumerates is an example of the type of equipment that may be collocated.[223]

95. Pacific defends the list of equipment it will allow interconnectors to place on its premises as following precisely the requirements of the *Expanded Interconnection Order*.[224] Similarly, GTE argues that termination equipment, including digital access and cross-connect systems, is permitted to be collocated under the terms of GTE's tariff.[225] Ameritech asserts that the restriction in its tariff limiting interconnectors from placing certain types of terminating equipment inside the central office is mirrored in the *Expanded Interconnection Order*.[226] It contends that the issue is under consideration in the Phase II interconnection docket.[227]

96. US West claims its interconnection standard is intended only to enable it to prevent harm to its network from non-standard equipment. US West is willing to amend its tariff to indicate that it will exercise its standard-setting discretion "reasonably."[228] US West asserts that its tariff language requiring identification of equipment is completely consistent with the *Expanded Interconnection Order*, and that Teleport's proposed language is too vague to be used as an equipment definition.[229]

97. *Discussion.* The *Expanded Interconnection Order* requires that LECs permit interconnectors to place, or designate for placement, central office equipment needed to terminate basic transmission facilities, including optical terminating equipment and multiplexers. The *Expanded Interconnection Order* does not require LECs to permit in their central offices other types of equipment unrelated to the competitive provisions of basic transmission services (such as enhanced services or customer premises equipment).[230] Most LECs have filed tariff revisions eliminating their initial equipment restrictions and instead using the broader language of the *Expanded Interconnection Order* summarized above. US West and Bell Atlantic, however, have not done so, and continue to limit too narrowly the types of equipment that can be collocated in their central offices. These LECs' provisions, therefore, violate the requirements of the *Expanded Interconnection Order*. Accordingly, Bell Atlantic, US West, and any other LEC having similar provisions restricting collocated equipment are required to delete such provisions from their tariffs and replace them with provisions using the broader language in the *Expanded Interconnection Order*.

IV. ORDERING CLAUSES

98. Accordingly, IT IS ORDERED that the local exchange carriers listed in Appendix A SHALL FILE tariff revisions on June 14, 1993, to become effective on not less than one day's notice, in order to advance the effective dates of the tariff revisions filed under the captioned transmittals to June 15, 1993.

99. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions filed under the captioned transmittals ARE SUSPENDED IN PART. The entire rate IS SUSPENDED for one day, and for the remainder of the 5-month suspension period the part of the rate that exceeds the levels justified by the present record, pursuant to Appendices C and D, IS SUSPENDED for five months. The local exchange carriers listed in Appendix C are ordered to issue tariff revisions in compliance with this Order, reflecting reductions and employing the Rate Adjustment Factors, where warranted, no later than June 14, 1993, with a scheduled effective date of June 16, 1993. The local exchange carriers listed in Appendix A are ordered to issue tariff revisions in compliance with this Order reflecting the GSF reductions ordered in the *GSF Order*, using the method described in Appendix D to calculate and apply new Rate Adjustment Factors reflecting the GSF reallocation, no later than July 16, 1993, to become effective on 5 days' notice.

100. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), 205(a) and 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed under the captioned transmittals.

101. IT IS FURTHER ORDERED that any related transmittals filed on June 14, 1993, and July 16, 1993, are subject to this investigation.

102. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C., 47 U.S.C. §§ 154(i) and 204(a) and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers filing the captioned transmittals and any subsequent related transmittals SHALL KEEP ACCURATE ACCOUNT of all earnings, costs, and returns associated with the rates that are the subject of this investigation, and of all amounts paid thereunder and by whom such amounts are paid.

103. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the local exchange carriers listed in the caption SHALL FILE tariff revisions reflecting this suspension no later than June 14, 1993.

104. IT IS FURTHER ORDERED that the tariff revisions filed by GTE Telephone Operating Companies and the GTE System Telephone Companies and any other local exchange carrier which permit the local exchange carrier to exempt itself from physical collocation, for state policy reasons, on an ongoing basis, without requesting exemption from, or being granted exemption by, the Commission, ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, deleting such provisions from their tariffs.

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223 BellSouth Reply at 35.

224 Pacific Reply at 44-45 (basic transmission facilities, including optical terminating equipment and multiplexers are allowed).

225 GTE Reply at 3-4.

226 Ameritech Reply at 35 (*citing Expanded Interconnection Order*, 7 FCC Rcd at 7413-14).

227 *Expanded Interconnection with Local Telephone Companies Facility*, Second Notice of Proposed Rulemaking, CC Docket No. 91-141 - Transport Phase II, 7 FCC Rcd 7740 (1992).

228 US West Reply at 69-70.

229 *Id.* at 78-79 (*quoting Expanded Interconnection Order*, 7 FCC Rcd at 7413).

230 *Expanded Interconnection Order*, 7 FCC Rcd at 7413.

105. IT IS FURTHER ORDERED that the tariff revisions filed by Lincoln Telephone & Telegraph Company, Centel Telephone Company, Bell Atlantic Telephone Companies, US West Communications, Inc., and any other local exchange carrier that propose physical collocation rate elements on an ICB basis ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions no later than July 16, 1993, to become effective on 5 days' notice, deleting references to such ICB charges from their physical collocation tariffs and instead specifying rates or time and materials charges for those rate elements.

106. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions no later than July 16, 1993, to become effective on 5 days' notice, offering virtual collocation to the same extent that it has tariffed physical collocation. Pursuant to the *Expanded Interconnection Order*, Pacific's virtual tariff SHALL SPECIFY all rates, terms, and conditions, and must not contain any reference to ICB pricing, except for the equipment dedicated to the virtual collocator.

107. IT IS FURTHER ORDERED that the tariff revisions filed by Bell Atlantic Telephone Companies and US West Communications, Inc. which provide for ICB pricing for virtual collocation, except for the equipment dedicated to the virtual collocator, ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions on July 16, 1993, to become effective on 5 days' notice, deleting any references to ICB pricing in their virtual collocation tariffs, with the exception of the equipment dedicated to the virtual collocator, and replacing them with specific rates or time and materials charges.

108. IT IS FURTHER ORDERED that the tariff revisions filed by US West Communications, Inc. which condition the provision of virtual collocation on the availability of space and facilities ARE UNLAWFUL and US West Communications, Inc. SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, deleting from its virtual collocation tariff the provisions conditioning its offering of virtual collocation on the availability of space and facilities.

109. IT IS FURTHER ORDERED that, pursuant to Section 0.291, the Common Carrier Bureau, on its own motion, GRANTS a blanket waiver of Paragraph 98 of the *Expanded Interconnection Order* to the extent necessary to permit all local exchange companies to tariff microwave collocation as an ICB offering, pending reconsideration of the *Expanded Interconnection Order*.

110. IT IS FURTHER ORDERED that any local exchange carrier that has not yet done so SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, tariffing an offer to provide microwave interconnection where reasonably feasible upon *bona fide* request, and to tariff any individually negotiated agreements and make them generally available.

111. IT IS FURTHER ORDERED that the tariff revisions filed by US West Communications, Inc., NYNEX Telephone Companies, Bell Atlantic Telephone Companies, and Ameritech Operating Companies which propose to prohibit physical and/or virtual collocation in leased offices or to condition the availability of physical and/or virtual collocation upon landlord approval ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, deleting from their collocation tariffs any provisions prohibiting physical and/or virtual collocation in leased offices or conditioning the availability of physical and/or virtual collocation upon landlord approval.

112. IT IS FURTHER ORDERED that the tariff revisions filed by United Telephone Companies, Centel Telephone Company, US West Communications, Inc., and any other local exchange carriers that propose to reference outside agreements in their tariffs ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, deleting from their collocation tariffs any references to outside agreements.

113. IT IS FURTHER ORDERED that, pursuant to Section 0.291, the Common Carrier Bureau, on its own motion, GRANTS a blanket waiver of Paragraph 89 of the *Expanded Interconnection Order* to the extent necessary to permit all LECs to provide only one entry point to an interconnector where the LEC has two or more entry points for itself, and all but one are at capacity, pending reconsideration of the *Expanded Interconnection Order*.

114. IT IS FURTHER ORDERED that the tariff revisions filed by Bell Atlantic Telephone Companies, US West Communications, Inc., and any other local exchange carrier that propose to restrict the type of equipment an interconnector may collocate more narrowly than permitted by the *Expanded Interconnection Order* ARE UNLAWFUL and these local exchange carriers SHALL FILE tariff revisions on June 14, 1993, to become effective on June 16, 1993, deleting such provisions from their collocation tariffs and replacing them with the broader language dealing with equipment restrictions in the *Expanded Interconnection Order*.

115. IT IS FURTHER ORDERED that the motions to accept late-filed pleadings filed by the Public Utilities Commission of Ohio and MFS Communications Company, Inc. ARE GRANTED.

116. IT IS FURTHER ORDERED that, for the above purposes, Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59, ARE WAIVED and Special Permission No. 93-466 is assigned.

117. IT IS FURTHER ORDERED that the petitions for rejection or suspension and investigation of the captioned tariffs filed by the petitioners listed in Appendix B ARE GRANTED to the extent indicated.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

APPENDIX A

LECs Filing Expanded Interconnection Tariffs[231]

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telecommunications Inc. (BellSouth)

Centel Telephone Company (Centel)

Cincinnati Bell Telephone Company (CBT)

GTE System Telephone Companies (GSTC)*

GTE Telephone Operating Companies (GTOC)*

Lincoln Telephone and Telegraph Co. (Lincoln)

Nevada Bell (Nevada)

NYNEX Telephone Companies (NYNEX)

Pacific Bell (Pacific)

Rochester Telephone Corporation (Rochester)

Southern New England Telephone Co. (SNET)

Southwestern Bell Telephone Company (SWB)

United Telephone Companies (United)

US West Communications, Inc. (US West)

*GTOC and GSTC are also referred to collectively as GTE.

APPENDIX B

Parties Filing Petitions to Reject or Suspend and Investigate and the LECs Against Which They Filed

Ad Hoc Telecommunications Users Committee (Ad Hoc) (Ameritech, Bell Atlantic, BellSouth, Centel, CBT, GTOC, Nevada, NYNEX, Pacific, Rochester, SWB, US West)

Association for Local Telecommunications Services (ALTS) (Ameritech, Bell Atlantic, BellSouth, Centel, GTOC, NYNEX, Pacific, SWB, US West)

MCI Communications Corporation (MCI) (Ameritech, Bell Atlantic, BellSouth, Centel, CBT, GSTC, GTOC, Lincoln, Nevada, NYNEX, Pacific, Rochester, SWB, United, US West)

MFS Communications Company, Inc. (MFS) (Ameritech, Bell Atlantic, BellSouth, Centel, GTOC, NYNEX, Pacific, SWB, US West)

Penn Access Corporation (PAC) (Bell Atlantic)

Public Utilities Commission of Ohio (PUCO) (Ameritech, CBT, GTOC, United)

Sprint Communications Company L.P. (Sprint) (Ameritech, Bell Atlantic, BellSouth, CBT, GTOC, NYNEX, Pacific, SWB, US West)

Teleport Communications Group, Inc. (Teleport) (Ameritech, Bell Atlantic, BellSouth, GTOC, Pacific, SWB, US West)

Teleport Denver Ltd. (TDL) (US West)

Wiltel, Inc. (WilTel) (Ameritech, BellSouth, NYNEX, Pacific, SWB, US West)

Wiltel, Inc. (WilTel) (Bell Atlantic)

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[231] Each LEC listed also filed an opposition to the petition(s) to reject or suspend and investigate filed against it.

APPENDIX C

Rate Allowances

RATE ADJUSTMENT FACTORS (RAFS)

Summary of Overhead and Direct Cost RAFs

AMERITECH

EI RATE ELEMENTS		RAF
Physical		
CO FLOOR SPACE RENTAL PER 100 SQ FT		98.86%
CENTRAL OFFICE BUILDOUT	NRC	90.85%
Virtual		
7' EQUIP BAY W/AT&T DDM 1000 FUSE PANEL		98.04%
DS-3 MULDEM (AKM3)		95.82%
DS-3 MULDEM (AKM3)		95.82%

BELL ATLANTIC

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1--PHYSICAL & VIRTUAL	63.19%
CROSS-CONNECT DS3--PHYSICAL & VIRTUAL	71.89%
CONNECTION SERVICE DS1--PHYSICAL	69.65%
CONNECTION SERVICE DS3--PHYSICAL	70.42%
CONNECTION SERVICE DS1--VIRTUAL	32.67%
CONNECTION SERVICE DS3--VIRTUAL	30.31%
CABLE SUPPORT--PHYSICAL	77.26%
CABLE SUPPORT--VIRTUAL	71.88%
OCCUPANCY FEE PER SQ FT	63.66%
POWER--DC (AC INCLUDED)	87.54%

BELLSOUTH

EI RATE ELEMENTS		RAF
CROSS-CONNECT DS1		95.20%
CROSS-CONNECT DS3		97.36%
INTERCONNECTION FLOOR SPACE--100 SQ FT		53.04%
OPTIONAL DC POWER--PER MODULE		94.69%
OPTIONAL BACK UP AC POWER --PER MODULE		94.55%
SPACE CONSTRUCTION	NRC	70.07%

NYNEX

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	95.73%
CROSS-CONNECT DS3	95.79%
CABLE SUPPORT--VAR	95.65%
DC POWER	95.77%

PACIFIC

[THERE ARE NO RAFs FOR PACIFIC]

NEVADA

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS3	98.89%

SOUTHWESTERN

EI RATE ELEMENTS	RAF
CONDUIT	49.40%
DC TRANSMISSION POWER	72.23%
DS1 INTERCONNECTION CROSS-CONNECT	67.86%
DS3 INTERCONNECTION CROSS-CONNECT	43.37%

US WEST

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	84.48%
CROSS-CONNECT DS3	84.58%
ENTRANCE STRUCTURE-PER FT, PER INNERDUCT	87.78%

CENTEL FLORIDA

EI RATE ELEMENTS	RAF
FLOOR SPACE PER SQ FT --ALL OFFICES	90.37%

CENTEL ILLINOIS

EI RATE ELEMENTS	RAF
TRANSMITTER/RECEIVER & FLOOR SPACE/SQ FT	
--DES PLAINES	89.02%

CENTEL NORTH CAROLINA

EI RATE ELEMENTS		RAF
FLOOR SPACE PER SQ FT	--ASHEBORO	95.82%
	--HICKORY MAIN	98.24%
	--SPRING ROAD	92.80%
	--MT AIRY	94.59%
	--NO. WILKESBORO	94.58%

CENTEL NEVADA

EI RATE ELEMENTS		RAF
FLOOR SPACE PER SQ FT	--NORTH 2	85.95%
	--NORTH 3	88.98%
	--NORTH 5	91.16%
	--WEST 8	90.11%
	--MAIN	87.40%

CENTEL VIRGINIA

EI RATE ELEMENTS	RAF
FLOOR SPACE PER SQ FT --CHARLOTT. MAIN	95.77%
--CHARLOTT. NO.	92.11%
--FRONT ROYAL	94.55%
--LEXINGTON	92.44%
--MARTINSVILLE	95.90%
--ROCKY MT	95.46%

CINCINNATI BELL

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS1	89.78%
CROSS-CONNECT DS3	89.74%
PARTITIONED SPACE PER SQ FT	
GROUP I	95.16%
GROUP II	92.54%
GROUP III	92.53%
RISER CABLE SPACE	
GROUP I	89.73%
GROUP II	89.74%
GROUP III	89.74%
CONDUIT PER DUCT FOOT	76.63%
DC POWER	
GROUP I	91.01%
GROUP II	91.19%
GROUP III	91.24%

CONTEL ILLINOIS

EI RATE ELEMENTS	RAF
PARTITION SPACE --FREEPORT	84.95%
--OREGON	85.07%
BUILDING MODIFICATION-SIMPLE NRC	78.65%
BUILDING MODIFICATION-MODERATE NRC	78.65%
CABLE SPACE --FREEPORT	90.84%
--OREGON	90.57%

CONTEL VIRGINIA

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION – SIMPLE	NRC	85.79%
BUILDING MODIFICATION – MODERATE	NRC	85.82%

GTE CALIFORNIA

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION – SIMPLE	NRC	78.22%
BUILDING MODIFICATION – MODERATE	NRC	78.22%
BUILDING MODIFICATION – COMPLEX	NRC	77.70%

GTE FLORIDA

EI RATE ELEMENTS		RAF
PARTITION SPACE	– – AUBURNDALE	88.41%
	– – CLEARWATER – MAIN	87.96%
	– – GANDY	87.98%
	– – PINELLAS	88.49%
	– – SARASOTA – MAIN	88.32%
	– – SWEETWATER	88.40%
	– – TAMPA #5	88.10%
	– – TAMPA – EAST	88.37%
	– – TAMPA – MAIN	88.10%
	– – UNIVERSITY (TAMPA)	88.67%
BUILDING MODIFICATION – SIMPLE	NRC	74.17%
BUILDING MODIFICATION – MODERATE	NRC	74.17%
BUILDING MODIFICATION – COMPLEX	NRC	74.17%
CABLE SPACE	– – AUBURNDALE	91.65%
	– – CLEARWATER – MAIN	91.93%
	– – GANDY	90.96%
	– – PINELLAS	92.51%
	– – SARASOTA – MAIN	91.49%
	– – SWEETWATER	90.81%
	– – TAMPA #5	92.61%
	– – TAMPA – EAST	91.53%
	– – TAMPA – MAIN	92.09%
	– – UNIVERSITY (TAMPA)	91.25%

GTE HAWAII

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–COMPLEX	NRC	82.90%

GTE IDAHO

EI RATE ELEMENTS		RAF
PARTITION SPACE	--COUER D'ALENE	90.84%
BUILDING MODIFICATION–COMPLEX	NRC	79.30%
CABLE SPACE	--COUER D'ALENE	96.13%

GTE ILLINOIS

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–SIMPLE	NRC	75.72%
BUILDING MODIFICATION–MODERATE	NRC	75.73%
BUILDING MODIFICATION–COMPLEX	NRC	75.71%

GTE KENTUCKY

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–MODERATE	NRC	82.83%

GTE MICHIGAN

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–MODERATE	NRC	77.04%

GTE OREGON

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–SIMPLE	NRC	74.16%
BUILDING MODIFICATION–MODERATE	NRC	74.16%
BUILDING MODIFICATION–COMPLEX	NRC	74.16%

GTE TEXAS

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–SIMPLE	NRC	80.32%
BUILDING MODIFICATION–MODERATE	NRC	80.32%
BUILDING MODIFICATION–COMPLEX	NRC	80.32%

GTE WASHINGTON

EI RATE ELEMENTS		RAF
BUILDING MODIFICATION–MODERATE	NRC	80.88%

LINCOLN

[THERE ARE NO RAFs FOR LINCOLN]

ROCHESTER

EI RATE ELEMENTS	RAF
CROSS-CONNECT DS3	99.58%

SNET

[THERE ARE NO RAFs FOR SNET]

UNITED FLORIDA

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.54%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	90.86%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	91.16%
CONDUIT SPACE, FIXED --ALTAMONTE SPRINGS	85.99%
--APOPKA	86.00%
--AVON PARK	85.99%
--CYPRESS LAKE	86.01%
--FORT MYERS-LEE	86.00%
--GOLDENROD	86.00%
--KISSIMMEE	85.99%
--LAKE BRANTLEY	86.00%
--OCALA	86.00%
--SOUTH FORT MYERS-CLEVELAND	86.00%
--WEST KISSIMMEE	85.99%
--WINTER PARK	85.99%
ROOF SPACE --ALTAMONTE SPRINGS	86.02%
--APOPKA	85.93%
--AVON PARK	85.93%
--CYPRESS LAKE	85.88%
--FORT MYERS-LEE	86.08%
--GOLDENROD	85.73%
--KISSIMMEE	86.15%
--LAKE BRANTLEY	85.88%
--OCALA	86.04%
--SOUTH FORT MYERS-CLEVELAND	85.94%
--WEST KISSIMMEE	86.03%
--WINTER PARK	85.95%
XMTR/RCVR SPACE --ALTAMONTE SPRINGS	86.24%
--APOPKA	85.93%
--AVON PARK	85.93%
--CYPRESS LAKE	85.88%
--FORT MYERS-LEE	86.02%
--GOLDENROD	85.73%
--KISSIMMEE	86.15%
--LAKE BRANTLEY	85.88%
--OCALA	86.04%
--SOUTH FORT MYERS-CLEVELAND	85.94%
--WEST KISSIMMEE	86.03%
--WINTER PARK	85.95%
FLOOR SPACE --ALTAMONTE SPRINGS	86.24%
--APOPKA	85.93%
--AVON PARK	85.93%
--CYPRESS LAKE	85.88%
--FORT MYERS-LEE	86.02%
--GOLDENROD	85.73%
--KISSIMMEE	86.15%
--LAKE BRANTLEY	85.88%
--OCALA	86.04%
--SOUTH FORT MYERS-CLEVELAND	85.94%
--WEST KISSIMMEE	86.03%
--WINTER PARK	85.95%
DC POWER --ALTAMONTE SPRINGS	86.89%
--APOPKA	86.32%
--AVON PARK	86.58%
--CYPRESS LAKE	86.69%
--FORT MYERS-LEE	86.37%
--GOLDENROD	86.21%
--KISSIMMEE	85.51%
--LAKE BRANTLEY	85.81%
--OCALA	86.53%
--SOUTH FORT MYERS-CLEVELAND	86.27%
--WEST KISSIMMEE	86.06%
--WINTER PARK	86.16%

UNITED INDIANA

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.96%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	91.85%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	92.04%

UNITED MIDWEST

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.65%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	91.71%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	91.97%
CONDUIT SPACE, FIXED --FERRELVIEW	98.72%
--JEFFERSON CITY	98.72%
--ROLLA	98.72%
ROOF SPACE --FERRELVIEW	98.61%
--JEFFERSON CITY	98.72%
--ROLLA	98.70%
XMTR/RCVR SPACE --FERRELVIEW	98.66%
--JEFFERSON CITY	98.73%
--ROLLA	98.73%
FLOOR SPACE --FERRELVIEW	98.66%
--JEFFERSON CITY	98.73%
--ROLLA	98.73%
DC POWER --FERRELVIEW	99.91%
--JEFFERSON CITY	99.61%
--ROLLA	98.70%

UNITED NORTH CAROLINA

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.56%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	90.78%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	91.10%
CONDUIT SPACE, FIXED --ELIZABETH CITY	78.52%
--FAYETTEVILLE-MCGILVARY	78.49%
--FAYETTEVILLE-MALLONEE	78.51%
--FRANKLINTON	78.51%
--GREENVILLE-FIFTH	78.49%
--HAVELOCK	78.52%
--HENDERSON	78.47%
--JACKSONVILLE-BOULEVARD	78.49%
--JACKSONVILLE-BRIDGE	78.49%
--KINSTON	78.51%
--NEW BERN	78.49%
--ROCKY MOUNT-WASHINGTON	78.52%
--SOUTHERN PINES	78.54%
--WILSON	78.52%
ROOF SPACE --ELIAZBETH CITY	78.83%
--FAYETTEVILLE-MCGILVARY	79.15%
--FAYETTEVILLE-MALLONEE	78.62%
--FRANKLINTON	78.56%
--GREENVILLE-FIFTH	78.74%
--HAVELOCK	78.92%
--HENDERSON	78.64%
--JACKSONVILLE-BOULEVARD	78.03%
--JACKSONVILLE-BRIDGE	78.47%
--KINSTON	78.41%
--NEW BERN	78.39%
--ROCKY MOUNT-WASHINGTON	78.35%
--SOUTHERN PINES	78.78%
--WILSON	78.72%
XMTR/RCVR SPACE --ELIZABETH CITY	78.09%
--FAYETTEVILLE-MCGILVARY	78.39%
--FAYETTEVILLE-MALLONEE	78.29%
--FRANKLINTON	78.53%
--GREENVILLE-FIFTH	78.38%
--HAVELOCK	78.14%
--HENDERSON	78.55%
--JACKSONVILLE-BOULEVARD	78.58%
--JACKSONVILLE-BRIDGE	78.59%
--KINSTON	78.99%
--NEW BERN	79.04%
--ROCKY MOUNT-WASHINGTON	78.29%
--SOUTHERN PINES	78.40%
--WILSON	78.39%
FLOOR SPACE --ELIAZBETH CITY	78.09%
--FAYETTEVILLE-MCGILVARY	78.39%
--FAYETTEVILLE-MALLONEE	78.29%
--FRANKLINTON	78.53%
--GREENVILLE-FIFTH	78.38%
--HAVELOCK	78.14%
--HENDERSON	78.55%
--JACKSONVILLE-BOULEVARD	78.58%
--JACKSONVILLE-BRIDGE	78.59%
--KINSTON	78.99%
--NEW BERN	79.04%
--ROCKY MOUNT-WASHINGTON	78.29%
--SOUTHERN PINES	78.40%
--WILSON	78.39%
DC POWER --ELIZABETH CITY	77.94%
--FAYETTEVILLE-MCGILVARY	77.74%
--FAYETTEVILLE-MALLONEE	78.24%
--FRANKLINTON	78.50%
--GREENVILLE-FIFTH	78.29%
--HAVELOCK	78.39%
--HENDERSON	78.11%
--JACKSONVILLE-BOULEVARD	78.26%
--JACKSONVILLE-BRIDGE	77.87%
--KINSTON	78.22%
--NEW BERN	77.94%
--ROCKY MOUNT-WASHINGTON	78.92%
--SOUTHERN PINES	78.29%
--WILSON	78.74%

UNITED OHIO

EI RATE ELEMENTS		RAF
CONDUIT SPACE		95.52%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL		91.08%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL		91.42%
CONDUIT SPACE, FIXED	--BELLEFONTAINE	99.35%
	--LEBANON	99.35%
	--LIMA-ELIZABETH	99.35%
	--MANSFIELD-MULBERRY	99.35%
	--MASON	99.35%
	--MOUNT VERNON	99.34%
	--SIDNEY	99.35%
	--WARREN-PARK	99.35%
	--WAYNESVILLE	99.35%
	--WOOSTER-LIBERTY	99.35%
ROOF SPACE	--BELLEFONTAINE	99.23%
	--LEBANON	99.35%
	--LIMA-ELIZABETH	99.39%
	--MANSFIELD-MULBERRY	99.33%
	--MASON	99.24%
	--MOUNT VERNON	99.34%
	--SIDNEY	99.21%
	--WARREN-PARK	99.47%
	--WAYNESVILLE	99.32%
	--WOOSTER-LIBERTY	99.34%
XMTR/RCVR SPACE	--BELLEFONTAINE	99.34%
	--LEBANON	99.42%
	--LIMA-ELIZABETH	99.40%
	--MANSFIELD-MULBERRY	99.39%
	--MASON	99.26%
	--MOUNT VERNON	99.43%
	--SIDNEY	99.39%
	--WARREN-PARK	99.33%
	--WAYNESVILLE	99.32%
	--WOOSTER-LIBERTY	99.35%
FLOOR SPACE	--BELLEFONTAINE	99.34%
	--LEBANON	99.42%
	--LIMA-ELIZABETH	99.40%
	--MANSFIELD-MULBERRY	99.39%
	--MASON	99.26%
	--MOUNT VERNON	99.43%
	--SIDNEY	99.39%
	--WARREN-PARK	99.33%
	--WAYNESVILLE	99.32%
	--WOOSTER-LIBERTY	99.35%
DC POWER	--BELLEFONTAINE	99.40%
	--LEBANON	99.40%
	--LIMA-ELIZABETH	99.30%
	--MANSFIELD-MULBERRY	98.27%
	--MASON	99.51%
	--MOUNT VERNON	99.24%
	--SIDNEY	98.96%
	--WARREN-PARK	99.93%
	--WAYNESVILLE	99.23%
	--WOOSTER-LIBERTY	99.37%

UNITED EASTERN GROUP

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.65%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	91.01%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	91.13%

UNITED SOUTHEAST GROUP

EI RATE ELEMENTS	RAF
CONDUIT SPACE	95.16%
CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	90.82%
CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	91.08%
CONDUIT SPACE, FIX --BRISTOL TN-SIXTH	88.17%
--JOHNSON CITY TN-ROAN	88.18%
--JOHNSON CITY TN-KINGSPORT	88.18%
--KINGSPORT TN-COMMERCE	88.19%
--MIDWAY TN	88.18%
--BRISTOL VA	88.17%
--WYTHEVILLE VA	88.18%
ROOF SPACE --BRISTOL TN-SIXTH	88.15%
--JOHNSON CITY TN-ROAN	88.16%
--JOHNSON CITY TN-KINGSPORT	88.16%
--KINGSPORT TN-COMMERCE	88.15%
--MIDWAY TN	88.15%
--BRISTOL VA	88.15%
--WYTHEVILLE VA	88.30%
XMTR/RCVR SPACE --BRISTOL TN-SIXTH	88.19%
--JOHNSON CITY TN-ROAN	88.29%
--JOHNSON CITY TN-KINGSPORT	88.14%
--KINGSPORT TN-COMMERCE	88.14%
--MIDWAY TN	88.21%
--BRISTOL VA	88.19%
--WYTHEVILLE VA	88.01%
FLOOR SPACE --BRISTOL TN-SIXTH	88.19%
--JOHNSON CITY TN-ROAN	88.29%
--JOHNSON CITY TN-KINGSPORT	88.14%
--KINGSPORT TN-COMMERCE	88.14%
--MIDWAY TN	88.21%
--BRISTOL VA	88.19%
--WYTHEVILLE VA	88.01%
DC POWER --BRISTOL TN-SIXTH	88.39%
--JOHNSON CITY TN-ROAN	87.27%
--JOHNSON CITY TN-KINGSPORT	89.16%
--KINGSPORT TN-COMMERCE	87.84%
--MIDWAY TN	88.01%
--BRISTOL VA	88.39%
--WYTHEVILLE VA	89.10%

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AMERITECH EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		AOC's CALCULATION			FCC's CALCULATION			
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
	Physical								
1	ELECTRICAL CROSS-CONNECT OPTINET DS1		1.58	$13.97	$8.84	1.64	$8.50		
2	ELECTRICAL CROSS-CONNECT OPTINET DS3		1.58	$57.99	$36.70	1.65	$35.08		
3	CO FLOOR SPACE RENTAL PER 100 SQ FT		1.58	$787.96	$498.75	1.82	$432.08	98.86%	
4	RISER SPACE PER FT		1.58	$1.88	$1.19	1.66	$1.14		
5	CONDUIT PER INNERDUCT FT		1.50	$0.06	$0.04	1.53	$0.04		
6	48 VOLT DC POWER		1.58	7.99	5.06	1.58	$5.06		
7	TERMINATION PANEL DS1		1.58	$317.06	$200.67	1.65	$192.08		
8	TERMINATION PANEL DS3		1.58	$680.66	$430.80	1.65	$412.33		
9	ORDER CHARGE	NRC	1.58	$531.00	$336.18	1.58	$336.18		see note 1
10	CENTRAL OFFICE BUILDOUT	NRC	1.58	$46,900.55	$29,684.00	1.98	$23,634.81	90.85%	
11	CABLE VAULT SPLICING--INITIAL	NRC	1.58	$193.19	$122.27	1.58	$122.27		
12	CABLE VAULT SPLICING--SUBSEQUENT	NRC	1.58	$15.06	$9.53	1.58	$9.53		
13	SPLICE TESING--INITIAL	NRC	1.58	$44.21	$27.98	1.58	$27.98		
14	SPLICE TESING--SUBSEQUENT	NRC	1.58	$2.61	$1.65	1.58	$1.65		
15	CABLE PULLING MANHOLE TO VAULT--1ST FT	NRC	1.58	$209.08	$132.33	1.58	$132.33		
16	CABLE PULLING MANHOLE TO VAULT--ADD'L FT	NRC	1.58	$1.04	$0.66	1.58	$0.66		
17	CABLE PULLING VAULT TO NODE--1ST FT	NRC	1.58	$78.06	$49.42	1.58	$49.42		
18	CABLE PULLING VAULT TO NODE--ADD'L FT	NRC	1.57	$0.77	$0.49	1.57	$0.49		
19	ABILITY TO CONNECT 7' EQUIP BAY	NRC	1.58	$16,549.13	$10,474.13	1.65	$10,025.97		
20	TRANSMISSION NODE PER 100 SQ FT	NRC	1.58	$5,747.93	$3,637.93	1.58	$3,637.93		
	Virtual								
21	DIGITAL CROSS-CONNECT PANEL DS1		1.58	$63.20	$40.00	1.63	$38.83		
22	DIGITAL CROSS-CONNECT PANEL DS3		1.58	$483.48	$306.00	1.65	$293.42		
23	CONDUIT PER INNERDUCT FT		1.50	$0.06	$0.04	1.53	$0.039		
24	RISER SPACE PER FT		1.54	$0.43	$0.28	1.68	$0.26		
25	RISER FACILITY PER FIBER TERMINATION		1.58	$2.01	$1.27	1.65	$1.22		
26	7' EQUIP BAY W/AT&T DDM 1000 FUSE PANEL		1.58	$79.14	$50.09	1.84	$43.04	98.04%	
27	AT&T DDM 1000, 90MBPS		1.58	$447.60	$283.29	1.66	$268.87		
28	90 MBS CKT PACK TELEMETRY (AKM4)		1.58	$16.50	$10.44	1.75	$9.43		
29	DS-3 MULDEM (AKM3)		1.58	$8.88	$5.62	1.88	$4.72	95.82%	
30	CKT PACK DS1 INTERFACE (AEK365)		1.58	$24.14	$15.26	1.71	$14.15		
31	AT&T DDM-1000, 180 MBPS		1.58	$646.14	$408.95	1.65	$391.51		
32	180 MBS CKT PACK TELEMETRY (AKM4)		1.58	$31.76	$20.10	1.68	$18.86		
33	DS-3 MULDEM (AKM3)		1.58	$8.88	$5.62	1.88	$4.72	95.82%	
34	PER MULDEM CONFIG -DS1 INTRFC CAP (AEK366)		1.58	$24.14	$15.26	1.71	$14.15		
35	DS3 CHANNEL PLUG-IN DS3U1 CKT PKG (AKM5)		1.58	$108.15	$68.45	1.64	$66.04		
36	DS3 CHANNEL PLUG-IN DS3U2 CKT PKG (AKM6)		1.58	$108.15	$68.45	1.64	$66.04		
37	DS3 TO DS1 MULTIPLEXER PLUG-IN (AKM2C)		1.58	$108.45	$68.45	1.64	$66.04		
38	DS1 CHANNEL PLUG-INS		1.58	$24.14	$15.26	1.71	$14.15		
39	SERVICE ORDER CHARGE	NRC	1.58	$181.70	$115.00	1.58	$115.00		see note 1
40	CABLE VAULT SPLICING--INITIAL	NRC	1.58	$193.19	$122.27	1.58	$122.27		
41	CABLE VAULT SPLICING--SUBSEQUENT	NRC	1.58	$15.06	$9.53	1.58	$9.53		
42	SPLICE TESING--INITIAL	NRC	1.58	$44.21	$27.98	1.58	$27.98		
43	SPLICE TESING--SUBSEQUENT	NRC	1.58	$2.61	$1.65	1.58	$1.65		
44	CABLE PULLING MANHOLE TO VAULT--1ST FT	NRC	1.58	$209.08	$132.33	1.58	$132.33		
45	CABLE PULLING MANHOLE TO VAULT--ADD'L FT	NRC	1.58	$1.04	$0.66	1.58	$0.66		
46	CABLE PULLING VAULT TO NODE--1ST FT	NRC	1.58	$78.06	$49.42	1.58	$49.42		
47	CABLE PULLING VAULT TO NODE--ADD'L FT	NRC	1.57	$0.77	$0.49	1.57	$0.49		
48	EQUIP BAY PER 7' BAY	NRC	1.58	$737.28	$466.63				see note 2
49	OLTM DDM 1000, 90MBPS	NRC	1.58	$9,301.29	$5,886.89				see note 2
50	PER DS3 MULDEM	NRC	1.58	$162.96	$103.14				see note 2
51	PER DS1 MULDEM	NRC	1.58	$1,653.82	$1,046.72				see note 2
52	OLTM DDM-1000, 180MBPS	NRC	1.58	$11,995.96	$7,592.39				see note 2
53	PER DS3 MULDEM	NRC	1.58	$162.96	$103.14				see note 2
54	PER DS1 MULDEM	NRC	1.58	$1,653.82	$1,046.72				see note 2
55	OLTM CHANNEL PLUG-INS DS3U1 CKT PACK	NRC	1.58	$1,797.55	$1,137.68				see note 2
56	OLTM CHANNEL PLUG-INS DS3U2 CKT PACK	NRC	1.58	$1,797.55	$1,137.68				see note 2
57	DS3 TO DS1 MULTIPLEXER PLUG-IN (AKM2C)	NRC	1.58	$344.00	$217.72				see note 2
58	DS1 CHANNEL PLUG-IN	NRC	1.58	$1,653.82	$1,046.72				see note 2
59	TEST EQUIPMENT		1.58	$45.79	$28.98				see note 2
60	PER AT&T DDM 1000 STORAGE SHELF		1.58	$45.79	$28.98				see note 2
61	POWER UNIT - 48V		1.58	$22.89	$14.49				see note 2
62	CIRCUIT PACK PROCESSOR		1.58	$38.18	$24.15				see note 2
63	CIRCUIT PACK DS3/1 M26R		1.58	$106.88	$67.63				see note 2
64	CIRCUIT PACK DS3/1 ELIU		1.58	$7.63	$4.83				see note 2
65	CIRCUIT PACK TELEMETRY		1.58	$15.26	$9.66				see note 2
66	CIRCUIT PACK DS3U2		1.58	$53.42	$33.81				see note 2
67	CIRCUIT PACK DS1 INTERFACE		1.58	$22.89	$14.49				see note 2
68	OPTICAL LINE INTERFACE UNIT, 180 MBPS		1.58	$183.17	$115.93				see note 2
69	OPTICAL LINE INTERFACE UNIT, 90 MBPS		1.66	$162.63	$98.60				see note 2
70	DS3U1 CIRCUIT PACK		1.58	$53.42	$33.81				see note 2
71	BP1 BYPASS CIRCUIT		1.57	$0.66	$0.42				see note 2
72	OPERATIONS AND MAINTENANCE								see note 2

ARMIS FACTOR	1.8026

NOTES:

1 More cost information is needed to determine whether FCC's view of the overhead factor should be adjusted upward.

2 There is insufficient cost support to analyze items 48 to 72

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BELL ATLANTIC EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		BA'S CALCULATION			FCC'S CALCULATION			
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1--PHYSICAL & VIRTUAL		2.10	$3.00	$1.43	2.42	$1.24	63.19%	
2	CROSS-CONNECT DS3--PHYSICAL & VIRTUAL		1.85	$40.00	$21.67	2.13	$18.81	71.89%	
3	CONNECTION SERVICE DS1--PHYSICAL		1.85	$64.00	$34.62	2.19	$29.16	69.65%	
4	CONNECTION SERVICE DS3--PHYSICAL		1.84	$88.00	$47.76	2.17	$40.54	70.42%	
5	CONNECTION SERVICE DS1--VIRTUAL		2.16	$67.00	$31.00	4.68	$14.32	32.67%	see note 1
6	CONNECTION SERVICE DS3--VIRTUAL		2.18	$257.00	$117.85	5.04	$50.95	30.31%	see note 1
7	CABLE SUPPORT--PHYSICAL		1.69	$405.00	$240.13	1.98	$204.69	77.26%	
8	CABLE SUPPORT--VIRTUAL		1.69	$249.00	$147.61	2.13	$117.08	71.88%	
9	CABLE INSTALLATION--PHYSICAL	NRC	1.00	$498.00	$497.26	1.00	$497.26		
10	CABLE INSTALLATION--VIRTUAL	NRC	1.00	$498.00	$497.26	1.00	$497.26		
11	OCCUPANCY FEE PER SQ FT		1.00	$3.32	$3.32				see note 2
12	POWER--DC (AC INCLUDED)		1.58	$206.00	$130.26	1.75	$117.97	87.54%	
13	CAGE CONSTRUCTION			ICB					see note 3
14	DESIGN AND PLANNING FEE--PHYSICAL	NRC	1.00	$2,228.00	$2,228.00		$0.00		see note 4
15	DESIGN AND PLANNING FEE--VIRTUAL	NRC	1.00	$3,640.00	$3,640.00		$0.00		see note 4

ARMIS FACTOR	1.5287

4623

NOTES:

1 FCC's calculation for this item reflects cost information provided in the data request.
2 Cost information is insufficient to analyze this item.
3 Rate is offered on an individual case basis.
4 There are no direct costs of the type reflected in FCC's calculation for this element.
5 It is noted that Bell Atlantic's calculation of direct cost as shown in the data request is modified by adding administrative and other taxes as shown in its EI filing.

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BELLSOUTH EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		BS's CALCULATION OVERHEAD FACTOR	BS's CALCULATION RATE	BS's CALCULATION DIRECT COST	FCC'S CALCULATION OVERHEAD FACTOR	FCC'S CALCULATION DIRECT COST	FCC'S CALCULATION RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1		1.32	$9.00	$6.80	1.60	$5.61	95.20%	
2	CROSS-CONNECT DS3		1.29	$76.00	$58.72	1.57	$48.43	97.36%	
3	CROSS-CONNECT DS1--1ST	NRC	1.02	$155.00	$151.54				see note 1
4	CROSS-CONNECT DS1--ADD'L	NRC	1.12	$14.00	$12.45				see note 1
5	CROSS-CONNECT DS3--1ST	NRC	1.00	$155.00	$154.91				see note 1
6	CROSS-CONNECT DS3--ADD'L	NRC	1.04	$13.00	$12.45				see note 1
7	INTERCONNECTION FLOOR SPACE--100 SQ FT		1.72	$931.00	$541.88	2.88	323.19	53.04%	
8	OPTIONAL DC POWER--PER MODULE		1.33	$199.00	$149.18	1.61	123.33	94.69%	
9	OPTIONAL DC POWER--PER MODULE	NRC	1.04	$17.00	$16.34				see note 1
10	OPTIONAL BACK UP AC POWER --PER MODULE		1.33	$194.00	$145.89	1.62	120.06	94.55%	
11	OPTIONAL BACK UP AC POWER --PER MODULE	NRC	1.04	$17.00	$16.34				see note 1
12	SPACE PREPARATION	NRC	1.00	$1,350.00	$1,347.80				see note 1
13	SPACE CONSTRUCTION	NRC	1.00	$51,660.00	$51,652.87				see note 2
14	SECURITY--BASIC TIME 1ST 1/2 HR OR FRACTION		1.02	$41.00	$40.24				see note 3
15	SECURITY--BASIC TIME ADD'L 1/2 HR OR FRACTION		1.02	$25.00	$24.42				see note 3
16	SECURITY--OVERTIME 1ST 1/2 HR OR FRACTION		1.01	$48.00	$47.57				see note 3
17	SECURITY--OVER TIME ADD'L 1/2 HR OR FRACTION		1.02	$30.00	$29.31				see note 3
18	SECURITY--PREM. TIME 1ST 1/2 HR OR FRACTION		1.00	$55.00	$54.90				see note 3
19	SECURITY--PREM TIME ADD'L 1/2 HR OR FRACTION		1.02	$35.00	$34.20				see note 3
20	APPLICATION FEE	NRC	1.00	$4,490.00	$4,488.37				see note 3

ARMIS FACTOR	1.5278

NOTES:

1 Cost information is insufficient to determine overhead ratio.

2 BellSouth's space construction costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether BellSouth's overhead factor should be adjusted upward.

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NYNEX EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	NYNEX's CALCULATION			FCC's CALCULATION			COMMENTS
		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1	1.50	$6.43	$4.29	1.87	$3.44	95.73%	
2	CROSS-CONNECT DS3	1.50	$80.36	$53.65	1.87	$43.03	95.79%	
	MULTIPLEXING NODE, ROOF, TRANS/REC'R SPACE							
3	NET	1.31	$2.97	$2.27	1.63	$1.82		
4	NYT1	1.30	$2.20	$1.69	1.62	$1.36		
5	NYT2	1.31	$3.11	$2.38	1.63	$1.91		
6	NYT3	1.31	$4.00	$3.06	1.63	$2.45		
7	NYT4	1.31	$5.33	$4.08	1.63	$3.27		
8	MULTIPLEXING NODE, ROOF, TRANS/REC'R SPACE NRC	1.00	$54,878.00	$54,878.00				see note 1
9	CABLE SUPPORT--FIXED	1.30	$51.36	$39.39	1.63	$31.59		
10	CABLE SUPPORT--VAR	1.50	$0.27	$0.18	1.87	$0.14	95.65%	
11	CABLE SPACE NRC							see note 2
12	OFFICE CT (CROSS-CONNECT DS1)--NEW NRC	1.00	$270.66	$270.66				see note 1
13	OFFICE CT (CROSS-CONNECT DS3)--NEW NRC	1.00	$393.44	$393.44				see note 1
14	OFFICE CT (CROSS-CONNECT DS1)-ROLLOVER NRC	1.00	$284.59	$284.59				see note 1
15	OFFICE CT (CROSS-CONNECT DS3)-ROLLOVER NRC	1.00	$407.37	$407.37				see note 1
16	DC POWER	1.50	$8.15	$5.44	1.87	$4.36	95.77%	

ARMIS FACTOR	1.7690

4625

NOTES:

1 Cost information is not sufficient to determine whether the overhead factor. should be adjusted upward.

2 Cable space NRC is based on engineering labor rates in existing tariff.

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PACIFIC'S EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		PACIFIC'S CALCULATION			FCC's CALCULATION			
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1		1.10	$7.73	$7.00	1.41	$5.50		
2	CROSS-CONNECT DS1	NRC	1.00	$180.00	$179.20				see note 1
3	CROSS-CONNECT DS3		1.10	$79.83	$72.50	1.43	$55.75		
4	CROSS-CONNECT DS3	NRC	1.00	$180.00	$179.20				see note 1
5	VAULT RACKING AND CABLE RISER SPACE/MO	-LOW	1.07	$139.00	$130.17	1.09	$127.63		see note 2
6	VAULT RACKING AND CABLE RISER SPACE/MO	-HIGH	1.05	$142.00	$134.75	1.02	$136.65		see note 2
7	CO FLOOR SPACE PER 100 SQ FT--	LOW	1.10	$747.00	$678.83	1.43	$522.36		see note 2
8	CO FLOOR SPACE PER 100 SQ FT--	HIGH	1.08	$833.00	$769.67	1.34	$623.95		see note 2
9	LICENSED SPACE SET UP--EXIST. IRONWORK	NRC	1.00	$16,064.00	$16,064.00				see note 1
10	LICENSED SPACE SET UP-- NEW IRONWORK	NRC		$19,516.00	$19,516.00				see note 1
11	COLLOCATION INFRASTRUCTURE SET UP	NRC		$24950 to $52116					see note 3
12	FIBER PLACEMENT/REMOVAL PER CABLE	NRC		$1112 to 4301					see note 3
13	SECURITY ACCESS--NEW	NRC		$8.70					see note 3
14	SECURITY ACCESS--REPLACEMENT	NRC		$22.70					see note 3
15	POWER--PER LIN FT PER 40 AMP	NRC		$4.59 to $14.55					see note 3
16	POWER--PER 40 AMP		1.18	$296.00	$251.67	1.52	$194.83		

ARMIS FACTOR	1.7348

4626

NOTES:

1 Cost information is not sufficient to determine whether the overhead ratio should be adjusted upward.

2 FCC's view reflects computations for a high and low cost central office. However, it appears that the other 49 offices will fall within this range.

3 Total cost equals the rate. Therefore, FCC's view cannot be computed because only total cost is provided.

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NEVADA BELL EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		NEVADA'S CALCULATION			FCC'S CALCULATION			COMMENTS
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1		1.04	$27.19	$26.24	1.27	$21.34		
2	CROSS-CONNECT DS1	NRC	1.00	$1,001.80	$1,001.80				see note 1
3	CROSS-CONNECT DS3		1.35	$126.29	$95.24	1.71	$75.19	98.89%	
4	CROSS-CONNECT DS3	NRC	1.00	$1,279.80	$1,279.80				see note 1
5	CONDUIT SPACE		1.37	$1.11	$0.81	1.07	$1.04		
6	CONDUIT SPACE	NRC	1.00	$39.38	$39.38				see note 1
7	POWER		1.02	$642.22	$628.50	1.08	$595.82		
8	POWER	NRC	1.00	$1,500.00	$1,500.00				see note 1
	INTERCONNNECTION CHAMBER								
9		--RENONV02	1.27	$1,084.09	$851.85				see note 2
10		--RENONV13	1.25	$1,157.65	$924.02				see note 2
11		--CRCYNV01	1.38	$902.71	$651.96				see note 2
12		--SPRKNV11	1.09	$1,763.95	$1,619.01				see note 2
	INTERCONNNECTION CHAMBER	NRC							
13		--RENONV02	1.77	$24,414.47	$13,800.00				see note 1
14		--RENONV13	1.38	$20,757.23	$15,000.00				see note 1
15		--CRCYNV01	1.52	$16,757.23	$11,000.00				see note 1
16		--SPRKNV11	1.03	$27,700.00	$26,800.00				see note 1
17	SECURITY ESCORT SERVICE--ENGINEER	NRC		$124.46					see note 3
18	SECURITY ESCORT SERVICE--TECHNICIAN	NRC		$88.71					see note 3
19	CABLE PULL AND SPLICE--ENGINEER	NRC		$124.46					see note 3
20	CABLE PULL AND SPLICE--TECHNICIAN	NRC		$88.71					see note 3

ARMIS FACTOR	1.6873

NOTES:

1 Cost information for NRCs is not sufficient to determine whether the overhead ratio should be adjusted upward. Cost components are not explained.

2 Cost information is not sufficient to determine FCC's calculation of direct costs and overhead ratio. Cost components are not provided.

3 Nevada did not provide direct cost data.

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SOUTHWESTERN EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		SWB's CALCULATION			FCC's CALCULATION			COMMENTS
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	POINT OF TERMINATION FRAME		2.46	$41.34	$16.82				see note 1
2	POINT OF TERMINATION FRAME	NRC	1.00	$2,743.00	$2,742.52	1.00	$2,742.52		
3	DS1 INTERCONNECTION ARRANGEMENT-		2.26	$139.40	$61.78				see note 1
4	DS1 INTERCONNECTION ARRANGEMENT	NRC	1.00	$10,065.00	$10,064.69	1.00	$10,064.69		
5	DS3 INTERCONNECTION ARRANGEMENT		3.53	$850.28	$240.65				see note 1
6	DS3 INTERCONNECTION ARRANGEMENT	NRC	1.00	$39,237.00	$39,237.31	1.00	$39,237.31		
7	POINT OF TERMINATION POWER ARRGMT		2.46	$158.27	$64.39				see note 1
8	POINT OF TERMINATION POWER ARRGMT	NRC	1.00	$10,500.00	$10,499.51	1.00	$10,499.51		
9	DS1 TRANSMISSION ARRANGEMENT		2.26	$17.65	$7.82				see note 1
10	DS1 TRANSMISSION ARRANGEMENT	NRC	1.00	$1,258.00	$1,258.35	1.00	$1,258.35		
11	DS3 TRANSMISSION ARRANGEMENT		3.53	$24.34	$6.89				see note 1
12	DS3 TRANSMISSION ARRANGEMENT	NRC	1.00	$1,110.00	$1,110.89	1.00	$1,110.89		
13	CONDUIT		2.46	$0.32	$0.13	3.27	$0.10	49.40%	see note 5
14	CABLE PULL	NRC							see note 2
15	DC TRANSMISSION POWER		1.91	$1,087.35	$568.52	2.24	$485.89	72.23%	
16	CAGE	NRC	1.00	$5,060.00	$5,059.63	1.00	$5,059.63		
17	HOUSE ELECTRIC	NRC	1.00	$2,207.00	$2,207.44	1.00	$2,207.44		
	FLOOR SPACE PER 100 SQ FT								
18	--ARK		1.01	$130.00	$129.25	1.00	$129.25		see note 3
19	--KS		1.01	$160.00	$158.83	1.00	$158.83		see note 3
20	--MO		1.00	$173.00	$172.67	1.00	$172.67		see note 3
21	--OK		1.00	$138.00	$137.67	1.00	$137.67		see note 3
22	--TX		1.00	$157.00	$156.75	1.00	$156.75		see note 3
23	TENANT ACCOMMODATION	NRC		$18034 to $71488					see note 4
24	DS1 INTERCONNECTION CROSS-CONNECT		2.26	$7.22	$3.20	2.38	$3.03	67.86%	
25	DS1 INTERCONNECTION CROSS-CONNECT	NRC	1.00	$125.00	$124.62	1.00	$124.62		
26	DS3 INTERCONNECTION CROSS-CONNECT		3.53	$112.84	$31.94	3.73	$30.28	43.37%	
27	DS3 INTERCONNECTION CROSS-CONNECT	NRC	1.00	$125.00	$124.59	1.00	$124.59		
28	RECONFIGURATION								see note 2
29	SECURITY ESCORT PER 1/2 HR								see note 2
30	ENGINEERING DESIGN		1.00	$1,563.00	$1,562.81	1.00	$1,562.81		

ARMIS FACTOR	1.6164

NOTES:

1 Southwestern's rate development is atypical and requires further analysis.
2 For items 14, 28 and 29, an existing tariff rate applies.
3 Rate is based on floor space value for locale.
4 Tenant Accommodation ratio cannot be determined. Southwestern did not provide direct cost data.
5 With Transmittal 2280, Southwestern proposes to reduce rates for items 1, 2, 7, 8 and 13.

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US WEST EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	USW's CALCULATION			FCC's CALCULATION			COMMENTS
		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1	1.83	$27.50	$15.03	2.19	$12.57	84.48%	
2	CROSS-CONNECT DS3	1.83	$313.50	$171.50	2.18	$143.50	84.58%	
3	PHYSICAL TENANT IMPROVEMENTS		ICB					see note 1
4	ENTRANCE STRUCTURE-PER FT, PER INNERDUCT	1.67	$0.10	$0.06	2.11	$0.05	87.78%	
5	BASE RENT 1-PER SQ FT	1.09	$4.63	$4.25	1.12	$4.14		
6	BASE RENT 2-PER SQ FT	1.11	$3.85	$3.47	1.15	$3.35		
7	BASE RENT 3-PER SQ FT	1.16	$2.78	$2.40	1.22	$2.28		
8	48 VOLTS DC POWER $/AMP --AZ	1.28	$12.66	$9.87	1.34	$9.46		
9	--CO	1.39	$10.02	$7.23	1.47	$6.82		
10	--IA	1.37	$10.30	$7.51	1.45	$7.10		
11	--ID	1.40	$9.79	$6.99	1.49	$6.58		
12	--MN	1.37	$10.40	$7.61	1.44	$7.20		
13	--MT	1.44	$9.12	$6.33	1.54	$5.92		
14	--ND	1.37	$10.26	$7.47	1.45	$7.06		
15	--NE	1.36	$10.64	$7.84	1.43	$7.43		
16	--NM	1.33	$11.20	$8.41	1.40	$8.00		
17	--OR	1.44	$9.12	$6.33	1.54	$5.92		
18	--SD	1.34	$10.92	$8.13	1.41	$7.72		
19	--UT	1.39	$9.97	$7.18	1.47	$6.77		
20	--WA	1.47	$8.70	$5.91	1.58	$5.50		
21	--WY	1.43	$9.31	$6.52	1.52	$6.11		
22	MAINTENANCE-PHYSICAL SPACE	1.83	$244.00	$133.33	1.83	$133.33		
23	HUMIDIFICATION-PHYSICAL SPACE	1.83	$61.00	$33.33	1.83	$33.33		
24	CROSS-CONNECT DS1 -- NRC		$487.00					see note 2
25	CROSS-CONNECT DS3-- NRC		$500.00					see note 2
26	QUOTATION PREP FEE P/V NRC NRC		$6,943.00					see note 2
27	QUOTATION PREP FEE MW NRC NRC		$21,023.00					see note 2
28	SECURITY SERVICE $/HR	1.02	$10.00	$9.79	1.02	9.79		
29	AFTER HOURS SECURITY SERVICE $/HR	1.02	$15.00	$14.69	1.02	14.69		

ARMIS FACTOR	1.8479

NOTES:

1 Rate is offered on individual case basis only.

2 Cost information is insufficient to determine whether the overhead factor should be adjusted upward.

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CENTEL FLORIDA EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	CENTEL's CALCULATION			FCC's CALCULATION			
	FLORIDA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1--PHYSICAL & VIRTUAL	1.30	$4.45	$3.41	1.40	$3.18		
2	CROSS-CONNECT DS3--PHYSICAL AND VIRTUAL	1.30	$32.93	$25.24	1.40	$23.53		
3	FLOOR SPACE PER SQ FT --ALL OFRCES	1.65	$1.30	$0.79	2.29	$0.57	90.37%	
4	APPLICATION FEE--PHYSICAL & VIRTUAL NRC	1.04	$3,493.00	$3,354.20				see note 3

ARMIS FACTOR	2.0731

NOTES:

1 Centel references existing tariff rates for its Security Escort, Equipment Installation and Cable Pull and Splice rate elements.

2 Centel proposes ICBs in Florida, Nevada, North Carolina and Virginia, for conduit space, roof space and transmitter/receiver space rate elements. Virtual collocation terminating equipment is also offered on an ICB basis for all states.

3 Cost information is insufficient to determine whether the overhead ratio should be adjusted upward.

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CENTEL ILLINOIS EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		CENTEL's CALCULATION			FCC's CALCULATION			
	ILLINOIS		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1--PHYS. & ALTERNATIVE		1.52	$19.13	$12.56	1.64	$11.67		
2	CROSS-CONNECT DS3--PHYS. & ALTERNATIVE		1.52	$46.97	$30.85	1.64	$28.65		
3	CROSS-CONNECT EQUIP DX1--ALTERNATIVE		1.52	$7.01	$4.60	1.64	$4.27		
4	CROSS-CONNECT EQUIP DX3--ALTERNATIVE		1.52	$50.92	$33.45	1.64	$31.06		
5	CONDUIT SPACE PER 100 SQ FT--DES PLAINES		1.51	$46.00	$30.42	1.63	$28.25		
6	--PARK RIDGE		1.27	$39.00	$30.75	1.37	$28.55		
7	CONDUIT SPACE FIXED/MO --DES PLAINES		1.52	$24.89	$16.35	1.64	$15.18		
8	--PARK RIDGE		1.52	$6.92	$4.55	1.59	$4.36		
9	ROOF SPACE PER SQ FT --DES PLAINES		1.59	$2.64	$1.66	2.05	$1.29		
10	--PARK RIDGE		1.60	$1.62	$1.01	2.03	$0.80		
11	TRANSMITTER/RECEIVER & FLOOR SPACE/SQ FT								
12	--DES PLAINES		1.93	$4.47	$2.31	2.54	$1.76	89.02%	
13	--PARK RIDGE		1.78	$4.99	$2.80	2.15	$2.33		
14	SITE PREP--ALTERNATIVE	NRC		$4,708.50					see note 3
15	APPLICATION FEE--PHYSICAL/FIBER	NRC	1.00	$3,867.00	$3,867.42				see note 3
16	APPLICATION FEE--PHYSICAL/MICROWAVE	NRC	1.00	$5,336.00	$5,336.10				see note 3
17	APPLICATION FEE--ALTERNATIVE	NRC	1.00	$807.67	$807.67				see note 3

ARMIS FACTOR	2.2578

NOTES:

1 Centel references existing tariff rates for its Security Escort, Equipment Installation and Cable Pull and Splice rate elements.

2 Centel proposes ICBs in Florida, Nevada, North Carolina and Virginia, for conduit space, roof space and transmitter/receiver space rate elements. Virtual collocation terminating equipment is also offered on an ICB basis for all states.

3 Cost information is insufficient to determine whether the overhead ratio should be adjusted upward.

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CENTEL NEVADA EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	CENTEL's CALCULATION			FCC's CALCULATION			
	NEVADA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1 - - PHYSICAL & VIRTUAL	1.43	$4.33	$3.02	1.51	$2.86		
2	CROSS-CONNECT DS3 - - PHYSICAL AND VIRTUAL	1.43	$66.81	$46.61	1.51	$44.22		
3	FLOOR SPACE PER SQ FT - - NORTH 2	1.81	$2.18	$1.20	2.19	$0.99	85.95%	
4	- - NORTH 3	1.85	$3.04	$1.65	2.12	$1.44	88.98%	
5	- - NORTH 5	1.87	$6.19	$3.30	2.07	$3.00	91.16%	
6	- - WEST 8	1.86	$4.38	$2.35	2.09	$2.10	90.11%	
7	- - MAIN	1.83	$1.84	$1.01	2.15	$0.86	87.40%	
8	APPLICATION FEE - - PHYS./FIBER & VIRTUAL NRC	1.00	$3,177.00	$3,176.69				see note 3
9	APPLICATION FEE - - PHYS./MICROWAVE NRC	1.00	$4,294.00	$4,294.33				see note 3

ARMIS FACTOR	1.8833

NOTES:

1 Centel references existing tariff rates for its Security Escort, Equipment Installation and Cable Pull and Splice rate elements.

2 Centel proposes ICBs in Florida, Nevada, North Carolina and Virginia, for conduit space, roof space and transmitter/receiver space rate elements. Virtual collocation terminating equipment is also offered on an ICB basis for all states.

3 Cost information is insufficient to determine whether the overhead ratio should be adjusted upward.

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CENTEL EI NORTH CAROLINA OVERHEAD ANALYSIS

	EI RATE ELEMENTS	CENTEL's CALCULATION			FCC's CALCULATION			
	NORTH CAROLINA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.32	$17.05	$12.95	1.43	$11.94		
2	CROSS-CONNECT DS3	1.32	$53.50	$40.64	1.43	$37.47		
3	FLOOR SPACE PER SQ FT --ASHEBORO	1.59	$1.54	$0.97	2.04	$0.76	95.82%	
4	--ELKIN	1.62	$2.73	$1.68	1.92	$1.42		
5	--HICKORY MAIN	1.60	$1.87	$1.17	1.99	$0.94	98.24%	
6	--SPRING ROAD	1.57	$1.17	$0.75	2.10	$0.56	92.80%	
7	--MT AIRY	1.57	$1.27	$0.81	2.07	$0.62	94.59%	
8	--NO. WILKESBORO	1.57	$1.48	$0.94	2.07	$0.72	94.58%	
9	APPLICATION FEE--PHYSICAL/FIBER NRC	1.00	$4,943.00	$4,942.63				see note 3
10	APPLICATION FEE--PHYSICAL/MICROWAVE NRC	1.00	$6,863.00	$6,863.24				see note 3

ARMIS FACTOR	1.9534

NOTES:

1 Centel references existing tariff rates for its Security Escort, Equipment Installation and Cable Pull and Splice rate elements.

2 Centel proposes ICBs in Florida, Nevada, North Carolina and Virginia, for conduit space, roof space and transmitter/receiver space rate elements. Virtual collocation terminating equipment is also offered on an ICB basis for all states.

3 Cost information is insufficient to determine whether the overhead ratio should be adjusted upward.

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CENTEL VIRGINIA EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	CENTEL's CALCULATION			FCC's CALCULATION			
	VIRGINIA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.34	$17.53	$13.06	1.41	$12.46		
2	CROSS-CONNECT DS3	1.34	$54.86	$40.86	1.41	$38.97		
3	FLOOR SPACE PER SQ FT --CHARLOTT. MAIN	1.69	$3.45	$2.05	1.94	$1.78	95.77%	
4	--CHARLOTT. NO.	1.66	$3.61	$2.18	2.01	$1.79	92.11%	
5	--FRONT ROYAL	1.68	$2.49	$1.48	1.96	$1.27	94.55%	
6	--LEXINGTON	1.66	$1.87	$1.12	2.01	$0.93	92.44%	
7	--MARTINSVILLE	1.69	$2.93	$1.73	1.93	$1.51	95.90%	
8	--ROCKY MT	1.68	$3.57	$2.12	1.94	$1.84	95.46%	
9	APPLICATION FEE--PHYSICAL/FIBER NRC	1.00	$4,801.00	$4,800.86				see note 3
10	APPLICATION FEE--PHYSICAL/MICROWAVE NRC	1.00	$6,663.00	$6,663.19				see note 3

ARMIS FACTOR	1.8537

NOTES:

1 Centel references existing tariff rates for its Security Escort, Equipment Installation and Cable Pull and Splice rate elements.

2 Centel proposes ICBs in Florida, Nevada, North Carolina and Virginia, for conduit space, roof space and transmitter/receiver space rate elements. Virtual collocation terminating equipment is also offered on an ICB basis for all states.

3 Cost information is insufficient to determine whether the overhead ratio should be adjusted upward.

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CINCINNATI EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	CINN's CALCULATION			FCC's CALCULATION			COMMENTS
		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1	2.22	$12.34	$5.57	2.21	$5.57	89.78%	
2	CROSS-CONNECT DS3	2.22	$70.98	$32.04	2.22	$32.04	89.74%	
	PARTITIONED SPACE PER SQ FT							
3	GROUP I	2.09	$4.37	$2.09	2.09	$2.09	95.16%	
4	GROUP II	2.15	$7.64	$3.56	2.15	$3.56	92.54%	
5	GROUP III	2.15	$8.21	$3.82	2.15	$3.82	92.53%	
6	PARTITIONED SPACE NRC	1.00	$16,000.00	$16,000.00				see note 1
	RISER CABLE SPACE							
7	GROUP I	2.22	$6.76	$3.05	2.22	$3.05	89.73%	
8	GROUP II	2.22	$20.28	$9.15	2.22	$9.15	89.74%	
9	GROUP III	2.22	$20.28	$9.15	2.22	$9.15	89.74%	
10	CONDUIT PER DUCT FOOT	2.67	$0.16	$0.06	2.59	$0.06	76.63%	
	BUILDING PREP DESIGN & CONSTRUCTION NRC							
11	GROUP I	1.00	$63,200.00	$63,200.00				see note 1
12	GROUP II	1.00	$80,800.00	$80,800.00				see note 1
13	GROUP III	1.00	$92,500.00	$92,500.00				see note 1
14	SECURITY ACCESS CARD PER CARD	1.00	$25.00	$25.00				see note 1
	DC POWER							
15	GROUP I	2.18	$21.84	$10.00	2.18	$10.00	91.01%	
16	GROUP II	2.18	$13.28	$6.09	2.18	$6.09	91.19%	
17	GROUP III	2.18	$15.66	$7.19	2.18	$7.19	91.24%	
18	FILING FEE	1.00	$636.47	$636.47				see note 1
19	APPLICATION FEE NRC		$7,500.00					see note 2

ARMIS FACTOR	1.9882

NOTES:

1 Cost information is insufficient to determine whether overhead ratio should be adjusted upward.

2 Cincinnati did not provide direct cost data.

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COIL EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS		GTOC's CALCULATION			FCC's CALCULATION			
	ILLINOIS		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1		1.70	$3.58	$2.11	1.80	$1.99		
2	CROSS-CONNECT DS3		1.70	$34.36	$20.17	1.81	$19.00		
3	DC POWER		1.00	$8.47	$8.47	1.05	$8.10		NOTE 1
4	PARTITION SPACE	--FREEPORT	2.13	$4.57	$2.15	2.34	$1.95	84.95%	
5		--OREGON	2.12	$5.01	$2.36	2.34	$2.14	85.07%	
6	OFFICE ARRANGEMENT	NRC	1.00	$7,775.00	$7,775.00	1.00	$7,775.00		NOTE 1
7	ENGINEERING FEE	NRC	1.00	$6,753.00	$6,752.20	1.00	$6,752.20		
8	BUILDING MODIFICATION-SIMPLE	NRC	1.00	$13,904.00	$13,903.60				NOTE 2
9	BUILDING MODIFICATION-MODERATE	NRC	1.00	$23,175.00	$23,174.34				NOTE 2
10	CABLE SPACE	--FREEPORT	2.01	$34.73	$17.29	2.19	$15.85	90.84%	
11		--OREGON	2.01	$29.28	$14.54	2.20	$13.33	90.57%	
12	CABLE PULL	--FREEPORT NRC	1.00	$1,138.00	$1,137.50				NOTE 3
13		--OREGON NRC	1.00	$1,113.00	$1,113.00				NOTE 3

ARMIS FACTOR	1.9901

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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COVA EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	VIRGINIA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.62	$3.56	$2.20	1.66	$2.15		
2	CROSS-CONNECT DS3	1.62	$32.21	$19.88	1.66	$19.43		
3	DC POWER	1.00	$7.78	$7.78	1.02	$7.64		NOTE 1
4	PARTITION SPACE --HARRISONBURG	2.02	$2.85	$1.41	2.10	$1.36		
5	--OCCOQUAN	1.98	$3.97	$2.01	2.16	$1.84		
6	OFFICE ARRANGEMENT NRC	1.00	$8,267.00	$8,267.00	1.00	$8,267.00		NOTE 1
7	ENGINEERING FEE NRC	1.00	$7,279.00	$7,278.60	1.00	$7,278.60		
8	BUILDING MODIFICATION-SIMPLE NRC	1.00	$13,569.00	$13,595.73				NOTE 2
9	BUILDING MODIFICATION-MODERATE NRC	1.00	$21,544.00	$21,543.38				NOTE 2
10	CABLE SPACE --HARRISONBURG	1.92	$15.78	$8.24	1.98	$7.96		
11	--OCCOQUAN	1.91	$17.63	$9.24	1.97	$8.93		
12	CABLE PULL --HARRISONBURG NRC	1.00	$1,144.00	$1,143.80				NOTE 3
13	--OCCOQUAN NRC	1.00	$1,098.00	$1,097.90				NOTE 3

ARMIS FACTOR	2.3848

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.
2 Direct Costs are miscalculated. See text of Order.
3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTCA EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	CALIFORNIA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.45	$3.77	$2.60	1.49	$2.53		
2	CROSS-CONNECT DS3	1.45	$33.21	$22.87	1.49	$22.24		
3	DC POWER	1.00	$10.02	$10.02	1.02	$9.80		NOTE 1
4	PARTITION SPACE --BALDWIN PK	1.81	$4.45	$2.46	1.90	$2.34		
5	--CAMARILLO	1.81	$5.80	$3.21	1.90	$3.05		
6	--COVINA	1.80	$2.41	$1.34	1.90	$1.27		
7	--GOLETA	1.81	$6.21	$3.43	1.90	$3.27		
8	--MALIBU	1.81	$8.16	$4.51	1.90	$4.29		
9	--MORGAN HILL	1.81	$3.79	$2.09	1.90	$1.99		
10	--NORWALK	1.81	$4.25	$2.35	1.90	$2.24		
11	--ONTARIO	1.81	$4.54	$2.51	1.90	$2.39		
12	--PALM DESERT	1.81	$5.31	$2.94	1.90	$2.80		
13	--SANTA BARBARA	1.81	$5.59	$3.09	1.90	$2.94		
14	--SANTA MARIA	1.81	$7.83	$4.33	1.90	$4.12		
15	--SEAL BEACH	1.81	$3.33	$1.84	1.90	$1.75		
16	--WEST LA	1.81	$4.92	$2.72	1.90	$2.59		
17	OFFICE ARRANGEMENT NRC	1.00	$11,029.00	$11,029.00	1.00	$11,029.00		NOTE 1
18	ENGINEERING FEE NRC	1.00	$9,109.00	$9,108.40	1.00	$9,108.40		
19	BUILDING MODIFICATION--SIMPLE NRC	1.00	$17,270.00	$17,269.19				NOTE 2
20	BUILDING MODIFICATION--MODERATE NRC	1.00	$28,781.00	$28,780.31				NOTE 2
21	BUILDING MODIFICATION--COMPLEX NRC	1.00	$44,610.00	$44,609.94				NOTE 2
22	CABLE SPACE --BALDWIN PK	1.71	$65.89	$38.52	1.79	$36.86		
23	--CAMARILLO	1.71	$79.47	$46.51	1.79	$44.50		
24	--COVINA	1.71	$52.95	$30.92	1.79	$29.58		
25	--GOLETA	1.71	$50.85	$29.68	1.79	$28.39		
26	--MALIBU	1.74	$16.60	$9.54	1.82	$9.11		
27	--MORGAN HILL	1.71	$46.07	$26.87	1.79	$25.70		
28	--NORWALK	1.71	$69.97	$40.92	1.79	$39.15		
29	--ONTARIO	1.73	$21.17	$12.23	1.81	$11.68		
30	--PALM DESERT	1.75	$14.38	$8.24	1.83	$7.86		
31	--SANTA BARBARA	1.76	$10.47	$5.94	1.85	$5.66		
32	--SANTA MARIA	1.71	$49.96	$29.16	1.79	$27.89		
33	--SEAL BEACH	1.71	$85.63	$50.13	1.79	$47.97		
34	--WEST LA	1.71	$73.45	$42.97	1.79	$41.12		
35	CABLE PULL --BALDWIN PK NRC	1.00	$1,441.00	$1,440.80				NOTE 3
36	--CAMARILLO NRC	1.00	$1,538.00	$1,537.10				NOTE 3
37	--COVINA NRC	1.00	$1,444.00	$1,443.60				NOTE 3
38	--GOLETA NRC	1.00	$1,372.00	$1,371.50				NOTE 3
39	--MALIBU NRC	1.00	$1,236.00	$1,235.60				NOTE 3
40	--MORGAN HILL NRC	1.00	$1,250.00	$1,250.00				NOTE 3
41	--NORWALK NRC	1.00	$1,673.00	$1,673.00				NOTE 3
42	--ONTARIO NRC	1.00	$1,217.00	$1,216.70				NOTE 3
43	--PALM DESERT NRC	1.00	$1,271.00	$1,270.70				NOTE 3
44	--SANTA BARBARA NRC	1.00	$1,238.00	$1,237.40				NOTE 3
45	--SANTA MARIA NRC	1.00	$1,493.00	$1,492.10				NOTE 3
46	--SEAL BEACH NRC	1.00	$1,837.00	$1,836.80				NOTE 3
47	--WEST LA NRC	1.00	$1,651.00	$1,650.50				NOTE 3

ARMIS FACTOR	2.2326

NOTES:
1 Rate includes possible double recovery of engineering and installation labor.
2 Direct Costs are miscalculated. See text of Order.
3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTFL EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	FLORIDA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.36	$3.80	$2.80	1.46	$2.61		
2	CROSS-CONNECT DS3	1.36	$36.02	$26.51	1.46	$24.66		
3	DC POWER	1.00	$8.32	$8.32	1.06	$7.83		NOTE 1
4	PARTITION SPACE --AUBURNDALE	1.71	$3.52	$2.06	1.93	$1.83	88.41%	
5	--CLEARWATER-MAIN	1.72	$2.85	1.66	1.94	$1.47	87.96%	
6	--GANDY	1.72	$1.94	$1.13	1.94	$1.00	87.98%	
7	--PINELLAS	1.71	$1.98	$1.16	1.93	$1.03	88.49%	
8	--SARASOTA-MAIN	1.71	$2.65	$1.55	1.93	$1.37	88.32%	
9	--SWEETWATER	1.71	$2.99	$1.75	1.93	$1.55	88.40%	
10	--TAMPA #5	1.71	$5.21	$3.04	1.94	$2.69	88.10%	
11	--TAMPA-EAST	1.71	$2.70	$1.58	1.93	$1.40	88.37%	
12	--TAMPA-MAIN	1.71	$5.21	$3.04	1.94	$2.69	88.10%	
13	--UNIVERSITY (TAMPA)	1.70	$2.13	$1.25	1.92	$1.11	88.67%	
14	OFFICE ARRANGEMENT NRC	1.03	$6,163.00	$6,008.00	1.03	$6,008.00		NOTE 1
15	ENGINEERING FEE NRC	1.00	$6,508.00	$6,507.20	1.00	$6,507.20		
16	BUILDING MODIFICATION-SIMPLE NRC	1.00	$13,376.00	$13,375.12				NOTE 2
17	BUILDING MODIFICATION-MODERATE NRC	1.00	$22,294.00	$22,293.27				NOTE 2
18	BUILDING MODIFICATION-COMPLEX NRC	1.00	$34,555.00	$34,554.76				NOTE 2
19	CABLE SPACE --AUBURNDALE	1.66	$17.88	$10.77	1.86	$9.61	91.65%	
20	--CLEARWATER-MAIN	1.66	$21.91	$13.23	1.85	$11.81	91.93%	
21	--GANDY	1.67	$13.28	$7.95	1.87	$7.08	90.96%	
22	--PINELLAS	1.65	$32.64	$19.81	1.84	$17.71	92.51%	
23	--SARASOTA-MAIN	1.66	$16.31	$9.81	1.86	$8.75	91.49%	
24	--SWEETWATER	1.67	$12.26	$7.33	1.88	$6.53	90.81%	
25	--TAMPA #5	1.65	$37.55	$22.81	1.84	$20.39	92.61%	
26	--TAMPA-EAST	1.66	$17.25	$10.38	1.86	$9.26	91.53%	
27	--TAMPA-MAIN	1.65	$23.98	$14.50	1.85	$12.95	92.09%	
28	--UNIVERSITY (TAMPA)	1.67	$14.81	$8.89	1.87	$7.93	91.25%	
29	CABLE PULL --AUBURNDALE NRC	1.00	$1,164.00	$1,163.28				NOTE 3
30	--CLEARWATER-MAIN NRC	1.00	$1,212.00	$1,212.00				NOTE 3
31	--GANDY NRC	1.00	$1,212.00	$1,212.00				NOTE 3
32	--PINELLAS NRC	1.00	$1,380.00	$1,380.00				NOTE 3
33	--SARASOTA-MAIN NRC	1.00	$1,187.00	$1,186.80				NOTE 3
34	--SWEETWATER NRC	1.00	$1,061.00	$1,060.80				NOTE 3
35	--TAMPA #5 NRC	1.00	$1,254.00	$1,254.00				NOTE 3
36	--TAMPA-EAST NRC	1.00	$1,225.00	$1,224.60				NOTE 3
37	--TAMPA-MAIN NRC	1.00	$1,313.00	$1,312.80				NOTE 3
38	--UNIVERSITY (TAMPA) NRC	1.00	$1,118.00	$1,117.08				NOTE 3

ARMIS FACTOR	1.7053

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTHI EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	HAWAII	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.46	$3.38	$2.32	1.52	$2.23		
2	CROSS-CONNECT DS3	1.46	$33.95	$23.29	1.52	$22.36		
3	DC POWER	1.00	$9.65	$9.65	1.03	$9.40		NOTE 1
4	PARTITION SPACE --ALAKEA/HONOLULU	1.83	$6.01	$3.28	1.93	$3.12		
5	OFFICE ARRANGEMENT NRC	1.04	$11,198.00	$10,779.00	1.03	$10,891.00		NOTE 1
6	ENGINEERING FEE NRC	1.00	$9,173.00	$9,172.80	1.00	$9,172.80		
7	BUILDING MODIFICATION-COMPLEX NRC	1.00	$42,703.00	$42,702.73				NOTE 2
8	CABLE SPACE --ALAKEA/HONOLULU	1.72	$29.40	$17.10	1.80	$16.29		
9	CABLE PULL --ALAKEA/HONOLULU NRC	1.00	$1,475.00	$1,475.00				NOTE 3

ARMIS FACTOR	2.2891

NOTES:
1 Rate includes possible double recovery of engineering and installation labor.
2 Direct Costs are miscalculated. See text of Order.
3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTID EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	IDAHO	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.38	$3.55	$2.58	1.43	$2.49		
2	CROSS-CONNECT DS3	1.38	$31.29	$22.72	1.43	$21.93		
3	DC POWER	1.00	$7.17	$7.17	1.03	$6.95		NOTE 1
4	PARTITION SPACE --COUER D'ALENE	1.66	$2.17	$1.31	1.76	$1.23	90.84%	
5	OFFICE ARRANGEMENT NRC	1.00	$6,289.00	$6,289.00	1.00	$6,289.00		
6	ENGINEERING FEE NRC	1.00	$9,079.00	$9,079.00	1.00	$9,079.00		NOTE 1
7	BUILDING MODIFICATION-COMPLEX NRC	1.00	$33,775.00	$33,774.39				NOTE 2
8	CABLE SPACE --COUER D'ALENE	1.58	$63.13	$40.02	1.67	$37.89	96.13%	
9	CABLE PULL --COUER D'ALENE NRC	1.00	$1,610.00	$1,610.00				NOTE 3

ARMIS FACTOR	1.6016

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTIL EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	ILLINOIS	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.35	$3.40	$2.52	1.42	$2.40		
2	CROSS-CONNECT DS3	1.35	$31.55	$23.36	1.42	$22.23		
3	DC POWER	1.00	$7.57	$7.57	1.05	$7.22		NOTE 1
4	PARTITION SPACE --BLOOMINGTON-EAST	1.65	$2.60	$1.58	1.81	$1.44		
5	--CARBONDALE	1.65	$3.11	1.89	1.81	$1.72		
6	--JACKSONVILLE	1.65	$3.21	$1.95	1.81	$1.78		
7	--LAWRENCEVILLE	1.64	$3.68	$2.24	1.80	$2.04		
8	--LINCOLN	1.64	$3.15	$1.92	1.80	$1.75		
9	--MACOMB	1.64	$4.17	$2.54	1.80	$2.31		
10	OFFICE ARRANGEMENT NRC	1.00	$7,899.00	$7,899.00	1.00	$7,899.00		NOTE 1
11	ENGINEERING FEE NRC	1.00	$7,076.00	$7,075.60	1.00	$7,075.60		
12	BUILDING MODIFICATION-SIMPLE NRC	1.00	$14,882.00	$14,881.57				NOTE 2
13	BUILDING MODIFICATION-MODERATE NRC	1.00	$22,981.00	$22,980.84				NOTE 2
14	BUILDING MODIFICATION-COMPLEX NRC	1.00	$43,740.00	$43,739.68				NOTE 2
15	CABLE SPACE --BLOOMINGTON-EAST	1.60	$16.06	$10.05	1.74	$9.22		
16	--CARBONDALE	1.59	$19.97	$12.54	1.73	$11.51		
17	--JACKSONVILLE	1.59	$25.30	$15.94	1.73	$14.64		
18	--LAWRENCEVILLE	1.59	$17.82	$11.18	1.74	$10.26		
19	--LINCOLN	1.59	$22.84	$14.37	1.73	$13.20		
20	--MACOMB	1.59	$19.97	$12.54	1.73	$11.51		
21	CABLE PULL --BLOOMINGTON-EAST NRC	1.00	$1,025.00	$1,025.00				NOTE 3
22	--CARBONDALE NRC	1.00	$1,097.00	$1,096.50				NOTE 3
23	--JACKSONVILLE NRC	1.00	$1,095.00	$1,095.00				NOTE 3
24	--LAWRENCEVILLE NRC	1.00	$1,023.00	$1,022.50				NOTE 3
25	--LINCOLN NRC	1.00	$1,039.00	$1,038.50				NOTE 3
26	--MACOMB NRC	1.00	$1,056.00	$1,055.50				NOTE 3

ARMIS FACTOR	1.8282

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTKY EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	KENTUCKY	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.35	$3.33	$2.46	1.39	$2.40		
2	CROSS-CONNECT DS3	1.35	$29.65	$21.92	1.38	$21.41		
3	DC POWER	1.00	$6.92	$6.92	1.02	$6.77		NOTE 1
4	PARTITION SPACE --LEXINGTON-EAST	1.63	$2.77	$1.70	1.70	$1.63		
5	--LEXINGTON-SOUTH	1.62	$2.24	1.38	1.69	$1.32		
6	--MOREHEAD	1.63	$2.57	$1.58	1.70	$1.52		
7	OFFICE ARRANGEMENT NRC	1.00	$6,825.00	$6,825.00	1.00	$6,825.00		NOTE 1
8	ENGINEERING FEE NRC	1.00	$6,583.00	$6,582.80	1.00	$6,582.80		
9	BUILDING MODIFICATION-MODERATE NRC	1.00	$22,345.00	$22,344.61				NOTE 2
10	CABLE SPACE --LEXINGTON-EAST	1.56	$18.23	$11.65	1.63	$11.22		
11	--LEXINGTON-SOUTH	1.56	$19.14	$12.24	1.62	$11.79		
12	--MOREHEAD	1.56	$22.57	$14.47	1.62	$13.94		
13	CABLE PULL --LEXINGTON-EAST NRC	1.00	$1,060.00	$1,059.14				NOTE 3
14	--LEXINGTON-SOUTH NRC	1.00	$1,060.00	$1,059.65				NOTE 3
15	--MOREHEAD NRC	1.00	$1,144.00	$1,143.29				NOTE 3

ARMIS FACTOR	1.7012

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTMI EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	MICHIGAN	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.39	$3.16	$2.28	1.46	$2.17		
2	CROSS-CONNECT DS3	1.39	$28.48	$20.49	1.46	$19.48		
3	DC POWER	1.00	$7.73	$7.73	1.04	$7.44		NOTE 1
4	PARTITION SPACE --MUSKEGON-MAIN	1.66	$3.53	$2.13	1.81	$1.95		
5	OFFICE ARRANGEMENT NRC	1.00	$5,222.00	$5,222.00	1.00	$5,222.00		NOTE 1
6	ENGINEERING FEE NRC	1.00	$6,219.00	$6,218.80	1.00	$6,218.80		
7	BUILDING MODIFICATION-COMPLEX NRC	1.00	$32,780.00	$32,779.47				NOTE 2
8	CABLE SPACE --MUSKEGON-MAIN	1.60	$32.74	$20.44	1.73	$18.89		
9	CABLE PULL --MUSKEGON-MAIN NRC	1.00	$1,192.00	$1,191.50				NOTE 3

ARMIS FACTOR	1.8252

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTOR EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	OREGON	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.39	$3.68	$2.64	1.49	$2.47		
2	CROSS-CONNECT DS3	1.39	$31.93	$22.93	1.49	$21.45		
3	DC POWER	1.00	$7.85	$7.85	1.06	$7.39		NOTE 1
4	PARTITION SPACE --ALOHA	1.66	$3.16	$1.90	1.87	$1.69		
5	--BEAVERTON	1.66	$3.26	1.96	1.87	$1.75		
6	--GRESHAM	1.67	$2.35	$1.41	1.87	$1.26		
7	--HILLSBORO	1.66	$2.54	$1.53	1.86	$1.36		
8	--SOMERSET WEST	1.66	$4.12	$2.48	1.86	$2.21		
9	OFFICE ARRANGEMENT NRC	1.00	$8,334.00	$8,334.00	1.00	$8,334.00		NOTE 1
10	ENGINEERING FEE NRC	1.00	$9,079.00	$9,079.00	1.00	$9,079.00		
11	BUILDING MODIFICATION-SIMPLE NRC	1.00	$16,103.00	$16,102.91				NOTE 2
12	BUILDING MODIFICATION-MODERATE NRC	1.00	$26,840.00	$26,839.14				NOTE 2
13	BUILDING MODIFICATION-COMPLEX NRC	1.00	$41,602.00	$41,601.77				NOTE 2
14	CABLE SPACE --ALOHA	1.61	$25.04	$15.58	1.79	$14.02		
15	--BEAVERTON	1.60	$45.45	$28.42	1.77	$25.62		
16	--GRESHAM	1.60	$61.06	$38.24	1.77	$34.49		
17	--HILLSBORO	1.59	$93.72	$58.78	1.77	$53.04		
18	--SOMERSET WEST	1.60	$47.72	$29.84	1.77	$26.90		
19	CABLE PULL --ALOHA NRC	1.00	$1,325.00	$1,324.88				NOTE 3
20	--BEAVERTON NRC	1.00	$1,404.00	$1,403.20				NOTE 3
21	--GRESHAM NRC	1.00	$1,507.00	$1,506.16				NOTE 3
22	--HILLSBORO NRC	1.00	$1,697.00	$1,696.24				NOTE 3
23	--SOMERSET WEST NRC	1.00	$1,390.00	$1,390.00				NOTE 3

ARMIS FACTOR	1.8931

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTTX EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	TEXAS	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.36	$3.17	$2.33	1.41	$2.25		
2	CROSS-CONNECT DS3	1.36	$28.00	$20.57	1.41	$19.83		
3	DC POWER	1.00	$7.29	$7.29	1.03	$7.07		NOTE 1
4	PARTITION SPACE --BRYAN-MAIN	1.64	$3.37	$2.05	1.76	$1.92		
5	--DENTON-MAIN	1.64	$2.69	1.64	1.75	$1.53		
6	--DFW AIRPORT	1.64	$4.90	$2.99	1.75	$2.80		
7	--IRVING-EAST	1.64	$3.03	$1.85	1.75	$1.73		
8	--IRVING-MAIN	1.64	$2.73	$1.66	1.76	$1.55		
9	--IRVING-NORTH	1.64	$5.91	$3.60	1.75	$3.37		
10	--IRVING-WEST	1.64	$3.52	$2.14	1.76	$2.00		
11	--PLANO-MAIN	1.64	$3.65	$2.22	1.76	$2.08		
12	--PLANO-WEST	1.65	$3.36	$2.04	1.76	$1.91		
13	--SAN ANGELO-MAIN	1.64	$2.44	$1.49	1.75	$1.39		
14	--TEXARKANA	1.64	$3.20	$1.95	1.75	$1.83		
15	OFFICE ARRANGEMENT NRC	1.00	$6,549.00	$6,549.00	1.00	$6,549.00		NOTE 1
16	ENGINEERING FEE NRC	1.00	$7,817.00	$7,816.20	1.00	$7,816.20		
17	BUILDING MODIFICATION-SIMPLE NRC	1.00	$13,240.00	$13,239.06				NOTE 2
18	BUILDING MODIFICATION-MODERATE NRC	1.00	$22,066.00	$22,065.89				NOTE 2
19	BUILDING MODIFICATION-COMPLEX NRC	1.00	$34,202.00	$34,201.87				NOTE 2
20	CABLE SPACE --BRYAN-MAIN	1.59	$15.35	$9.67	1.69	$9.10		
21	--DENTON-MAIN	1.57	$37.55	$23.92	1.66	$22.56		
22	--DFW AIRPORT	1.58	$22.06	$13.98	1.67	$13.17		
23	--IRVING-EAST	1.56	$90.77	$58.09	1.66	$54.82		
24	--IRVING-MAIN	1.57	$40.62	$25.89	1.66	$24.42		
25	--IRVING-NORTH	1.57	$29.42	$18.70	1.67	$17.63		
26	--IRVING-WEST	1.57	$35.74	$22.76	1.67	$21.46		
27	--PLANO-MAIN	1.59	$15.55	$9.80	1.69	$9.22		
28	--PLANO-WEST	1.57	$41.56	$26.49	1.66	$24.98		
29	--SAN ANGELO-MAIN	1.58	$19.33	$12.23	1.68	$11.52		
30	--TEXARKANA	1.60	$11.49	$7.19	1.70	$6.76		
31	CABLE PULL --BRYAN-MAIN NRC	1.00	$1,022.00	$1,021.27				NOTE 3
32	--DENTON-MAIN NRC	1.00	$1,127.00	$1,126.30				NOTE 3
33	--DFW AIRPORT NRC	1.00	$1,036.00	$1,035.85				NOTE 3
34	--IRVING-EAST NRC	1.00	$1,180.00	$1,179.49				NOTE 3
35	--IRVING-MAIN NRC	1.00	$1,117.00	$1,116.85				NOTE 3
36	--IRVING-NORTH NRC	1.00	$1,026.00	$1,025.05				NOTE 3
37	--IRVING-WEST NRC	1.00	$1,069.00	$1,068.25				NOTE 3
38	--PLANO-MAIN NRC	1.00	$1,027.00	$1,026.13				NOTE 3
39	--PLANO-WEST NRC	1.00	$1,085.00	$1,084.45				NOTE 3
40	--SAN ANGELO-MAIN NRC	1.00	$1,034.00	$1,033.15				NOTE 3
41	--TEXARKANA NRC	1.00	$1,005.00	$1,004.80				NOTE 3

ARMIS FACTOR	1.8442

NOTES:
1 Rate includes possible double recovery of engineering and installation labor.
2 Direct Costs are miscalculated. See text of Order.
3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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GTWA EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	GTOC's CALCULATION			FCC's CALCULATION			
	WASHINGTON	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.36	$3.50	$2.57	1.43	$2.44		
2	CROSS-CONNECT DS3	1.36	$31.08	$22.78	1.44	$21.63		
3	DC POWER	1.00	$7.27	$7.27	1.05	$6.93		NOTE 1
4	PARTITION SPACE --BOTHELL-NORTH	1.64	$2.64	$1.61	1.79	$1.48		
5	--HALLS LAKE	1.63	$3.03	1.86	1.77	$1.71		
6	--KIRKLAND	1.63	$3.17	$1.94	1.78	$1.78		
7	--REDMOND	1.63	$2.94	$1.80	1.78	$1.65		
8	OFFICE ARRANGEMENT NRC	1.01	$8,822.00	$8,753.00	1.01	$8,753.00		NOTE 1
9	ENGINEERING FEE NRC	1.00	$9,079.00	$9,079.00	1.00	$9,079.00		
10	BUILDING MODIFICATION-MODERATE NRC	1.00	$25,679.00	$25,678.72				NOTE 2
11	CABLE SPACE --BOTHELL-NORTH	1.58	$54.38	$34.51	1.70	$31.92		
12	--HALLS LAKE	1.58	$53.49	$33.94	1.70	$31.39		
13	--KIRKLAND	1.59	$19.48	$12.27	1.72	$11.33		
14	--REDMOND	1.58	$26.23	$16.58	1.71	$15.32		
15	CABLE PULL --BOTHELL-NORTH NRC	1.00	$1,452.00	$1,451.60				NOTE 3
16	--HALLS LAKE NRC	1.00	$1,452.00	$1,451.60				NOTE 3
17	--KIRKLAND NRC	1.00	$1,390.00	$1,390.00				NOTE 3
18	--REDMOND NRC	1.00	$1,443.00	$1,442.80				NOTE 3

ARMIS FACTOR	2.0940

4647

NOTES:

1 Rate includes possible double recovery of engineering and installation labor.

2 Direct Costs are miscalculated. See text of Order.

3 Cost information is insufficient to determine whether overhead factor should be adjusted upward.

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LINCOLN EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS		LINCOLN's CALCULATION			FCC's CALCULATION			COMMENTS
			OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1		1.00	$3.55	$3.55	1.39	2.56		
2	CROSS-CONNECT DS3		NA	NA	NA	NA	NA		
3	CO FLOOR SPACE RENTAL PER 100 SQ FT		1.00	$5.05	$5.05	1.40	$3.62		
4	CONDUIT FACILITY		1.00	$141.85	$141.85	1.38	$102.48		
5	POWER		1.00	$71.06	$71.06	1.22	$58.40		
6	SERVICE PREPARATION	NRC		$7,500.00					see note 1
7	CABLE INSTALLATION	NRC		$14.55 to $41.57					see note 3
8	SUPERVISION	NRC		$39.50 to $79.20					see notes 1 & 2
9	CABLE MAINTENANCE & REARRANGEMENT	NRC		$14.55 to $41.57					see note 3

ARMIS FACTOR	1.4648

NOTES:
1 Cost information is insufficient to determine ratio. Cost components are not provided.
2 Rates are per hour or fraction thereof with a two hour minimum and
are assessed for supervision of interconnector personnel.
3 Lincoln did not provide direct cost data.

4648

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ROCHESTER EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	ROCHESTER's CALCULATION			FCC's CALCULATION			COMMENTS
		OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	
1	CROSS-CONNECT DS1	1.41	$5.00	$3.54	1.59	$3.14		
2	CROSS-CONNECT DS3	1.45	$52.00	$35.83	1.64	$31.78	99.58%	
3	OFFICE SPACE PER 100 SQ FT		$316.67					see note 1
4	CONDUIT PER CABLE		$10.00					see note 1
5	POWER		$0.20					see note 1
6	CABLE SPACE PER CABLE		$90.00					see note 1

ARMIS FACTOR	1.6294

NOTES:
1 Rochester did not provide direct cost data. Rates were developed under State PSC.

4649

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SNET EI OVERHEAD ANALYSIS

	EI RATE ELEMENTS	SNET's CALCULATION ======= OVERHEAD FACTOR	RATE	DIRECT COST	FCC's CALCULATION ======= OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CROSS-CONNECT DS1	1.49	$7.81	$5.25	1.49	$5.25		
2	CROSS-CONNECT DS3	1.49	$64.81	$43.50	1.49	$43.50		
3	CO FLOOR SPACE RENTAL PER SQ FT	1.00	$6.25	$6.25	1.10	$5.67		
4	RISER SPACE	1.39	$1.50	1.08	1.39	1.08		
5	INNERDUCT PER FT, PER MO	1.50	$0.18	$0.12	1.50	$0.12		
6	DC POWER	1.48	$17.75	$12.00	1.48	$12.00		
7	APPLICATION FEE NRC	1.49	$10,670.00	$7,161.00				see note 1
8	FLOOR SPACE CONSTRUCTION --100 SQ FT NRC	1.49	$82,500.00	$55,437.00				see note 1
9	--200 SQ FT NRC	1.49	$102,500.00	$68,906.00				see note 1
10	--300 SQ FT NRC	1.49	$122,500.00	$82,374.00				see note 1
11	--400 SQ FT NRC	1.49	$142,000.00	$95,342.00				see note 1
12	SLICING	1.48	$80.00	$54.00				see note 2
13	PULLING	1.48	$80.00	$54.00				see note 2
14	DESIGN ENGINEERING	1.55	$85.00	$55.00				see note 2
15	CROSS-CONNECT DS1 NRC	1.48	$260.00	$176.00		$0.00		see note 3
16	CROSS-CONNECT DS3 NRC	1.49	$274.00	$184.00		$0.00		see note 3

ARMIS FACTOR	1.8283

NOTES:

1 Cost information is insufficient to determine whether overhead ratio should be adjusted upward.

2 Cost information is insufficient to determine direct cost and ratio.

3 There are no direct costs of the type reflected in FCC's calculation for this element.

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	FLORIDA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.43	$0.57	$0.40	1.48	$0.39		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.38	$3.70	$2.68	1.43	$2.58		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.40	$31.00	$22.07	1.48	$21.27		NOTE 1
4	CONDUIT SPACE, FIXED --ALTAMONTE SPRINGS	1.85	$34.48	$20.92	1.73	$19.91	85.99%	
5	--APOPKA	1.85	$59.55	36.14	1.73	$34.38	86.00%	
6	--AVON PARK	1.85	$30.99	$18.80	1.73	$17.89	85.99%	
7	--CYPRESS LAKE	1.85	$39.57	$24.01	1.73	$22.85	86.01%	
8	--FORT MYERS-LEE	1.85	$77.00	$46.73	1.73	$44.46	86.00%	
9	--GOLDENROD	1.85	$29.90	$18.14	1.73	$17.26	86.00%	
10	--KISSIMMEE	1.85	$53.68	$32.57	1.73	$30.99	85.99%	
11	--LAKE BRANTLEY	1.85	$41.85	$25.46	1.73	$24.22	86.00%	
12	--OCALA	1.85	$41.23	$25.02	1.73	$23.81	86.00%	
13	--SOUTH FORT MYERS-CLEVELAND	1.85	$46.97	$28.50	1.73	$27.12	86.00%	
14	--WEST KISSIMMEE	1.85	$95.84	$58.16	1.73	$55.33	85.99%	
15	--WINTER PARK	1.85	$39.59	$24.02	1.73	$22.86	85.99%	
16	ROOF SPACE --ALTAMONTE SPRINGS	1.84	$1.72	$1.05	1.73	$0.99	86.02%	
17	--APOPKA	1.85	$2.98	$1.81	1.73	$1.72	85.93%	
18	--AVON PARK	1.85	$1.55	$0.94	1.73	$0.89	85.93%	
19	--CYPRESS LAKE	1.85	$1.98	$1.20	1.73	$1.14	85.86%	
20	--FORT MYERS-LEE	1.85	$2.47	$1.50	1.73	$1.43	86.08%	
21	--GOLDENROD	1.85	$1.50	$0.91	1.74	$0.86	85.73%	
22	--KISSIMMEE	1.84	$2.88	$1.83	1.73	$1.55	86.15%	
23	--LAKE BRANTLEY	1.85	$2.10	$1.27	1.73	$1.21	85.88%	
24	--OCALA	1.85	$2.08	$1.25	1.73	$1.19	86.04%	
25	--SOUTH FORT MYERS-CLEVELAND	1.84	$2.35	$1.43	1.73	$1.36	85.94%	
26	--WEST KISSIMMEE	1.85	$4.79	$2.91	1.73	$2.77	86.03%	
27	--WINTER PARK	1.85	$1.98	$1.20	1.73	$1.14	85.95%	
28	XMTR/RCVR SPACE --ALTAMONTE SPRINGS	1.84	$1.72	$1.05	1.73	$1.00	86.24%	
29	--APOPKA	1.85	$2.98	$1.81	1.73	$1.72	85.93%	
30	--AVON PARK	1.85	$1.55	$0.94	1.73	$0.89	85.93%	
31	--CYPRESS LAKE	1.85	$1.98	$1.20	1.73	$1.14	85.86%	
32	--FORT MYERS-LEE	1.85	$3.85	$2.34	1.73	$2.22	86.02%	
33	--GOLDENROD	1.85	$1.50	$0.91	1.74	$0.86	85.73%	
34	--KISSIMMEE	1.84	$2.88	$1.83	1.73	$1.55	86.15%	
35	--LAKE BRANTLEY	1.85	$2.10	$1.27	1.73	$1.21	85.88%	
36	--OCALA	1.85	$2.08	$1.25	1.73	$1.19	86.04%	
37	--SOUTH FORT MYERS-CLEVELAND	1.84	$2.35	$1.43	1.73	$1.36	85.94%	
38	--WEST KISSIMMEE	1.85	$4.79	$2.91	1.73	$2.77	86.03%	
39	--WINTER PARK	1.85	$1.98	$1.20	1.73	$1.14	85.95%	
40	FLOOR SPACE --ALTAMONTE SPRINGS	1.84	$1.72	$1.05	1.73	$1.00	86.24%	
41	--APOPKA	1.85	$2.98	$1.81	1.73	$1.72	85.93%	
42	--AVON PARK	1.85	$1.55	$0.94	1.73	$0.89	85.93%	
43	--CYPRESS LAKE	1.85	$1.98	$1.20	1.73	$1.14	85.86%	
44	--FORT MYERS-LEE	1.85	$3.85	$2.34	1.73	$2.22	86.02%	
45	--GOLDENROD	1.85	$1.50	$0.91	1.74	$0.86	85.73%	
46	--KISSIMMEE	1.84	$2.88	$1.83	1.73	$1.55	86.15%	
47	--LAKE BRANTLEY	1.85	$2.10	$1.27	1.73	$1.21	85.88%	
48	--OCALA	1.85	$2.08	$1.25	1.73	$1.19	86.04%	
49	--SOUTH FORT MYERS-CLEVELAND	1.84	$2.35	$1.43	1.73	$1.36	85.94%	
50	--WEST KISSIMMEE	1.85	$4.79	$2.91	1.73	$2.77	86.03%	
51	--WINTER PARK	1.85	$1.98	$1.20	1.73	$1.14	85.95%	
52	DC POWER --ALTAMONTE SPRINGS	1.85	$0.51	$0.31	1.71	$0.30	86.89%	
53	--APOPKA	1.84	$1.31	$0.80	1.73	$0.76	86.32%	
54	--AVON PARK	1.87	$0.40	$0.24	1.72	$0.23	86.58%	
55	--CYPRESS LAKE	1.84	$0.64	$0.39	1.72	$0.37	86.86%	
56	--FORT MYERS-LEE	1.80	$0.24	$0.15	1.72	$0.14	86.37%	
57	--GOLDENROD	1.87	$0.55	$0.33	1.73	$0.32	86.21%	
58	--KISSIMMEE	1.86	$0.63	$0.38	1.74	$0.36	85.51%	
59	--LAKE BRANTLEY	1.84	$0.92	$0.56	1.74	$0.53	85.81%	
60	--OCALA	1.87	$0.35	$0.21	1.72	$0.20	86.53%	
61	--SOUTH FORT MYERS-CLEVELAND	1.85	$1.40	$0.85	1.73	$0.81	86.27%	
62	--WEST KISSIMMEE	1.84	$1.66	$1.01	1.73	$0.96	86.06%	
63	--WINTER PARK	1.82	$0.34	$0.21	1.73	$0.20	86.16%	

ARMIS FACTOR	1.4895

NOTES

1. Conduit includes double encased cost for installation and engineering labor

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UTIN EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	INDIANA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.63	$0.62	$0.38	1.68	$0.37		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.57	$4.00	$2.55	1.63	$2.46		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.57	$33.20	$21.11	1.63	$20.33		NOTE 1
4	CONDUIT SPACE, FIXED --WARSAW	1.42	$161.28	$113.82	1.73	$93.45		
5	ROOF SPACE --WARSAW	1.42	$5.70	$4.02	1.73	$3.30		
6	XMTR/RCVR SPACE --WARSAW	1.42	$8.06	$5.69	1.72	$4.67		
7	FLOOR SPACE --WARSAW	1.42	$8.06	$5.69	1.72	$4.67		
8	DC POWER --WARSAW	1.42	$2.01	$1.42	1.72	$1.17		

ARMIS FACTOR	1.8529

NOTES:
1 Costs include double recovered cost for installation and engineering labor.

4652

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UTMW EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	MIDWEST – MISSOURI ONLY	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.49	$0.55	$0.37	1.55	$0.36		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.47	$3.60	$2.45	1.52	$2.37		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.47	$30.10	$20.45	1.52	$19.74		NOTE 1
4	CONDUIT SPACE, FIXED --FERREL VIEW	1.36	$63.37	$46.47	1.78	$35.65	98.72%	
5	--JEFFERSON CITY	1.36	$94.38	69.21	1.78	$53.10	98.72%	
6	--ROLLA	1.36	$238.82	$175.13	1.78	$134.37	98.72%	
7	ROOF SPACE --FERREL VIEW	1.37	$2.23	$1.63	1.78	$1.25	98.61%	
8	--JEFFERSON CITY	1.36	$3.22	$2.36	1.78	$1.81	98.72%	
9	--ROLLA	1.36	$8.24	$6.04	1.78	$4.64	98.70%	
10	XMTR/RCVR SPACE --FERREL VIEW	1.37	$3.17	$2.32	1.78	$1.78	98.66%	
11	--JEFFERSON CITY	1.36	$4.72	$3.46	1.78	$2.66	98.73%	
12	--ROLLA	1.36	$11.94	$8.76	1.78	$6.72	98.73%	
13	FLOOR SPACE --FERREL VIEW	1.37	$3.17	$2.32	1.78	$1.78	98.66%	
14	--JEFFERSON CITY	1.36	$4.72	$3.46	1.78	$2.66	98.73%	
15	--ROLLA	1.36	$11.94	$8.76	1.78	$6.72	98.73%	
16	DC POWER --FERREL VIEW	1.38	$0.18	$0.13	1.76	$0.10	99.91%	
17	--JEFFERSON CITY	1.33	$0.32	$0.24	1.76	$0.18	99.61%	
18	--ROLLA	1.37	$0.52	$0.38	1.78	$0.29	98.70%	

ARMIS FACTOR	1.7546

4653

NOTES:
1 Costs include double recovered cost for installation and engineering labor.

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UTNC EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	NORTH CAROLINA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.43	$0.57	$0.40	1.46	$0.39		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.37	$3.90	$2.63	1.39	$2.58		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.39	$30.30	$21.75	1.42	$21.32		NOTE 1
4	CONDUIT SPACE, FIXED - - ELIZABETH CITY	1.58	$15.31	$9.68	1.91	$9.00	78.52%	
5	- - FAYETTEVILLE - MCGILVARY	1.58	$12.41	7.84	1.92	$6.48	78.49%	
6	- - FAYETTEVILLE - MALLONEE	1.58	$12.76	$8.07	1.91	$6.88	78.51%	
7	- - FRANKLINTON	1.58	$45.40	$29.70	1.91	$23.71	78.51%	
8	- - GREENVILLE - FIFTH	1.58	$13.98	$8.83	1.92	$7.30	78.49%	
9	- - HAVELOCK	1.58	$16.71	$10.58	1.91	$8.73	78.52%	
10	- - HENDERSON	1.58	$8.58	$6.05	1.92	$5.00	78.47%	
11	- - JACKSONVILLE - BOULEVARD	1.58	$19.82	$12.62	1.92	$10.35	78.48%	
12	- - JACKSONVILLE - BRIDGE	1.58	$19.02	$12.02	1.92	$9.93	78.48%	
13	- - KINSTON	1.58	$14.48	$9.16	1.91	$7.56	78.51%	
14	- - NEWBERN	1.58	$16.80	$10.68	1.92	$8.82	78.48%	
15	- - ROCKY MOUNT - WASHINGTON	1.58	$14.34	$9.07	1.91	$7.49	78.52%	
16	- - SOUTHERN PINES	1.58	$11.58	$7.32	1.91	$6.05	78.54%	
17	- - WILSON	1.58	$19.34	$12.23	1.91	$10.10	78.52%	
18	ROOF SPACE - - ELIZABETH CITY	1.67	$0.58	$0.37	1.91	$0.30	78.83%	
19	- - FAYETTEVILLE - MCGILVARY	1.67	$0.44	$0.28	1.90	$0.23	78.18%	
20	- - FAYETTEVILLE - MALLONEE	1.67	$0.58	$0.37	1.91	$0.30	78.62%	
21	- - FRANKLINTON	1.58	$2.14	$1.36	1.91	$1.12	78.56%	
22	- - GREENVILLE - FIFTH	1.58	$0.48	$0.31	1.91	$0.26	78.74%	
23	- - HAVELOCK	1.58	$0.70	$0.45	1.90	$0.37	78.82%	
24	- - HENDERSON	1.67	$0.38	$0.23	1.91	$0.19	78.84%	
25	- - JACKSONVILLE - BOULEVARD	1.90	$0.83	$0.52	1.93	$0.43	78.03%	
26	- - JACKSONVILLE - BRIDGE	1.67	$0.72	$0.46	1.92	$0.38	78.47%	
27	- - KINSTON	1.58	$0.54	$0.34	1.92	$0.28	78.41%	
28	- - NEWBERN	1.58	$0.62	$0.39	1.92	$0.32	78.39%	
29	- - ROCKY MOUNT - WASHINGTON	1.67	$0.58	$0.36	1.92	$0.29	78.36%	
30	- - SOUTHERN PINES	1.58	$0.45	$0.29	1.91	$0.24	78.78%	
31	- - WILSON	1.58	$0.61	$0.61	1.91	$0.42	78.72%	
32	XMTR/RCVR SPACE - - ELIZABETH CITY	1.90	$0.77	$0.48	1.93	$0.40	78.09%	
33	- - FAYETTEVILLE - MCGILVARY	1.58	$0.62	$0.39	1.92	$0.32	78.30%	
34	- - FAYETTEVILLE - MALLONEE	1.90	$0.64	$0.40	1.92	$0.33	78.29%	
35	- - FRANKLINTON	1.58	$2.27	$1.43	1.91	$1.19	78.53%	
36	- - GREENVILLE - FIFTH	1.58	$0.70	$0.44	1.92	$0.37	78.36%	
37	- - HAVELOCK	1.58	$0.84	$0.53	1.92	$0.44	78.14%	
38	- - HENDERSON	1.90	$0.48	$0.30	1.91	$0.25	78.56%	
39	- - JACKSONVILLE - BOULEVARD	1.67	$0.99	$0.63	1.91	$0.52	78.54%	
40	- - JACKSONVILLE - BRIDGE	1.58	$0.96	$0.60	1.91	$0.50	78.59%	
41	- - KINSTON	1.67	$0.72	$0.46	1.90	$0.38	78.99%	
42	- - NEWBERN	1.58	$0.84	$0.53	1.90	$0.44	79.04%	
43	- - ROCKY MOUNT - WASHINGTON	1.90	$0.72	$0.45	1.92	$0.38	78.29%	
44	- - SOUTHERN PINES	1.67	$0.58	$0.37	1.92	$0.30	78.40%	
45	- - WILSON	1.59	$0.97	$0.61	1.92	$0.51	78.36%	
46	FLOOR SPACE - - ELIZABETH CITY	1.90	$0.77	$0.48	1.93	$0.40	78.09%	
47	- - FAYETTEVILLE - MCGILVARY	1.58	$0.62	$0.39	1.92	$0.32	78.30%	
48	- - FAYETTEVILLE - MALLONEE	1.90	$0.64	$0.40	1.92	$0.33	78.29%	
49	- - FRANKLINTON	1.58	$2.27	$1.43	1.91	$1.19	78.53%	
50	- - GREENVILLE - FIFTH	1.59	$0.70	$0.44	1.92	$0.37	78.36%	
51	- - HAVELOCK	1.58	$0.84	$0.53	1.92	$0.44	78.14%	
52	- - HENDERSON	1.90	$0.48	$0.30	1.91	$0.25	78.58%	
53	- - JACKSONVILLE - BOULEVARD	1.67	$0.99	$0.63	1.91	$0.52	78.54%	
54	- - JACKSONVILLE - BRIDGE	1.58	$0.96	$0.60	1.91	$0.50	78.59%	
55	- - KINSTON	1.67	$0.72	$0.46	1.90	$0.38	78.99%	
56	- - NEWBERN	1.58	$0.84	$0.53	1.90	$0.44	79.04%	
57	- - ROCKY MOUNT - WASHINGTON	1.90	$0.72	$0.45	1.92	$0.38	78.29%	
58	- - SOUTHERN PINES	1.67	$0.58	$0.37	1.92	$0.30	78.40%	
59	- - WILSON	1.58	$0.97	$0.61	1.92	$0.51	78.36%	
60	DC POWER - - ELIZABETH CITY	1.67	$0.36	$0.23	1.93	$0.18	77.84%	
61	- - FAYETTEVILLE - MCGILVARY	1.62	$0.34	$0.21	1.93	$0.16	77.74%	
62	- - FAYETTEVILLE - MALLONEE	1.58	$1.14	$0.72	1.92	$0.56	78.24%	
63	- - FRANKLINTON	1.59	$1.84	$1.16	1.92	$0.90	78.50%	
64	- - GREENVILLE - FIFTH	1.67	$0.44	$0.28	1.92	$0.23	78.29%	
65	- - HAVELOCK	1.58	$0.93	$0.59	1.92	$0.46	78.39%	
66	- - HENDERSON	1.62	$0.34	$0.21	1.92	$0.16	78.11%	
67	- - JACKSONVILLE - BOULEVARD	1.58	$1.13	$0.71	1.92	$0.56	78.24%	
68	- - JACKSONVILLE - BRIDGE	1.61	$0.37	$0.23	1.93	$0.18	77.87%	
69	- - KINSTON	1.58	$0.41	$0.26	1.92	$0.21	78.22%	
70	- - NEWBERN	1.64	$0.18	$0.11	1.93	$0.09	77.94%	
71	- - ROCKY MOUNT - WASHINGTON	1.58	$0.30	$0.19	1.90	$0.18	78.92%	
72	- - SOUTHERN PINES	1.67	$0.38	$0.23	1.92	$0.19	78.29%	
73	- - WILSON	1.58	$0.63	$0.40	1.91	$0.33	78.74%	

ARMIS FACTOR	1.6032

NOTES

1 Costs include double recovered cost of ter installation and engineering labor

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UTOH EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	OHIO	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.38	$0.55	$0.40	1.50	$0.37		NOTE 1
2	CROSS--CONNECT DS1 PHYSICAL OR VIRTUAL	1.32	$3.50	$2.65	1.44	$2.43		NOTE 1
3	CROSS--CONNECT DS3 PHYSICAL OR VIRTUAL	1.34	$29.50	$21.99	1.46	$20.20		NOTE 1
4	CONDUIT SPACE, FIXED --BELLEFONTAINE	1.51	$70.98	$47.03	1.82	$39.06	99.35%	
5	--LEBANON	1.51	$121.48	$0.48	1.82	$66.85	99.35%	
6	--LIMA-ELIZABETH	1.51	$83.43	$55.28	1.82	$45.91	99.35%	
7	--MANSFIELD-MULBERRY	1.51	$160.27	$106.18	1.82	$88.19	99.35%	
8	--MASON	1.51	$92.73	$61.44	1.82	$51.03	99.35%	
9	--MOUNT VERNON	1.51	$123.69	$81.95	1.82	$68.06	99.34%	
10	--SIDNEY	1.51	$86.83	$57.53	1.82	$47.78	99.35%	
11	--WARREN-PARK	1.51	$103.96	$68.88	1.82	$57.21	99.35%	
12	--WAYNESVILLE	1.51	$193.96	$128.50	1.82	$106.73	99.35%	
13	--WOOSTER-LIBERTY	1.51	$183.79	$121.76	1.82	$101.13	99.35%	
14	ROOF SPACE --BELLEFONTAINE	1.51	$2.52	$1.67	1.82	$1.39	99.23%	
15	--LEBANON	1.51	$4.26	$2.82	1.82	$2.34	99.35%	
16	--LIMA-ELIZABETH	1.51	$2.89	$1.92	1.82	$1.59	99.39%	
17	--MANSFIELD-MULBERRY	1.51	$5.65	$3.74	1.82	$3.11	99.33%	
18	--MASON	1.51	$3.24	$2.14	1.82	$1.78	99.24%	
19	--MOUNT VERNON	1.51	$4.33	$2.87	1.82	$2.38	99.34%	
20	--SIDNEY	1.51	$3.08	$2.04	1.82	$1.69	99.21%	
21	--WARREN-PARK	1.51	$3.65	$2.42	1.82	$2.01	99.47%	
22	--WAYNESVILLE	1.51	$9.70	$6.43	1.82	$5.34	99.32%	
23	--WOOSTER-LIBERTY	1.51	$6.57	$4.35	1.82	$3.62	99.34%	
24	XMTR/RCVR SPACE --BELLEFONTAINE	1.51	$3.55	$2.35	1.82	$1.95	99.34%	
25	--LEBANON	1.51	$6.07	$4.02	1.82	$3.34	99.42%	
26	--LIMA-ELIZABETH	1.51	$4.17	$2.76	1.82	$2.30	99.40%	
27	--MANSFIELD-MULBERRY	1.51	$8.01	$5.31	1.82	$4.41	99.39%	
28	--MASON	1.51	$4.64	$3.07	1.82	$2.55	99.26%	
29	--MOUNT VERNON	1.51	$6.18	$4.10	1.82	$3.40	99.43%	
30	--SIDNEY	1.51	$4.34	$2.88	1.82	$2.39	99.39%	
31	--WARREN-PARK	1.51	$5.20	$3.44	1.82	$2.86	99.33%	
32	--WAYNESVILLE	1.51	$9.70	$6.43	1.82	$5.34	99.32%	
33	--WOOSTER-LIBERTY	1.51	$9.19	$6.09	1.82	$5.06	99.35%	
34	FLOOR SPACE --BELLEFONTAINE	1.51	$3.55	$2.35	1.82	$1.95	99.34%	
35	--LEBANON	1.51	$6.07	$4.02	1.82	$3.34	99.42%	
36	--LIMA-ELIZABETH	1.51	$4.17	$2.76	1.82	$2.30	99.40%	
37	--MANSFIELD-MULBERRY	1.51	$8.01	$5.31	1.82	$4.41	99.39%	
38	--MASON	1.51	$4.64	$3.07	1.82	$2.55	99.26%	
39	--MOUNT VERNON	1.51	$6.18	$4.10	1.82	$3.40	99.43%	
40	--SIDNEY	1.51	$4.34	$2.88	1.82	$2.39	99.39%	
41	--WARREN-PARK	1.51	$5.20	$3.44	1.82	$2.86	99.33%	
42	--WAYNESVILLE	1.51	$9.70	$6.43	1.82	$5.34	99.32%	
43	--WOOSTER-LIBERTY	1.51	$9.19	$6.09	1.82	$5.06	99.35%	
44	DC POWER --BELLEFONTAINE	1.51	$4.19	$2.78	1.82	$2.31	99.40%	
45	--LEBANON	1.53	$0.61	$0.40	1.82	$0.34	99.40%	
46	--LIMA-ELIZABETH	1.52	$1.35	$0.89	1.82	$0.74	99.30%	
47	--MANSFIELD-MULBERRY	1.52	$0.32	$0.21	1.84	$0.17	98.27%	
48	--MASON	1.50	$1.32	$0.88	1.81	$0.73	99.51%	
49	--MOUNT VERNON	1.52	$0.99	$0.65	1.82	$0.54	99.24%	
50	--SIDNEY	1.51	$0.71	$0.47	1.82	$0.39	98.96%	
51	--WARREN-PARK	1.51	$0.53	$0.35	1.81	$0.29	99.93%	
52	--WAYNESVILLE	1.51	$1.21	$0.80	1.82	$0.67	99.23%	
53	--WOOSTER-LIBERTY	1.50	$1.67	$1.11	1.82	$0.92	99.37%	

ARMIS FACTOR	1.8055

NOTES:
1 Costs include double recovered cost of for installation and engineering labor.

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UTEG EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	EASTERN GROUP – PENNSYLVANIA ONLY	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.40	$0.60	$0.43	1.44	$0.42		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.39	$3.80	$2.74	1.42	$2.68		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.39	$31.40	$22.64	1.42	$22.12		NOTE 1
4	CONDUIT SPACE, FIXED --BUTLER	1.40	$62.40	$44.72	1.46	$42.81		
5	--CARLISLE	1.40	$50.83	36.42	1.46	$34.87		
6	--CHAMBERSBURG	1.40	$44.90	$32.17	1.46	$30.80		
7	--GETTYSBURG	1.40	$35.36	$25.34	1.46	$24.26		
8	--HANOVER	1.40	$44.07	$31.58	1.46	$30.23		
9	ROOF SPACE --BUTLER	1.39	$2.12	$1.52	1.46	$1.46		
10	--CARLISLE	1.40	$1.73	$1.24	1.46	$1.19		
11	--CHAMBERSBURG	1.40	$1.53	$1.09	1.46	$1.05		
12	--GETTYSBURG	1.40	$1.20	$0.86	1.45	$0.83		
13	--HANOVER	1.40	$1.50	$1.07	1.46	$1.03		
14	XMTR/RCVR SPACE --BUTLER	1.39	$3.12	$2.24	1.46	$2.14		
15	--CARLISLE	1.40	$2.54	$1.82	1.46	$1.74		
16	--CHAMBERSBURG	1.39	$2.24	$1.61	1.45	$1.54		
17	--GETTYSBURG	1.39	$1.77	$1.27	1.46	$1.21		
18	--HANOVER	1.39	$2.20	$1.58	1.46	$1.51		
19	FLOOR SPACE --BUTLER	1.39	$3.12	$2.24	1.46	$2.14		
20	--CARLISLE	1.40	$2.54	$1.82	1.46	$1.74		
21	--CHAMBERSBURG	1.39	$2.24	$1.61	1.45	$1.54		
22	--GETTYSBURG	1.39	$1.77	$1.27	1.46	$1.21		
23	--HANOVER	1.39	$2.20	$1.58	1.46	$1.51		
24	DC POWER --BUTLER	1.45	$0.16	$0.11	1.45	$0.11		
25	--CARLISLE	1.38	$0.22	$0.16	1.45	$0.15		
26	--CHAMBERSBURG	1.42	$0.17	$0.12	1.49	$0.11		
27	--GETTYSBURG	1.39	$0.86	$0.62	1.45	$0.59		
28	--HANOVER	1.36	$0.30	$0.22	1.45	$0.21		
29	INTERCONNECTION REARRANGEMENT NRC	1.00	$105.00	$105.24	1.00	$105.24		
30	APPLICATION FEE, PHYSICAL OR VIRTUAL NRC	1.00	$2,887.00	$2,887.38		$0.00		NOTE 2

ARMIS FACTOR	1.6099

NOTES:

1 Costs include double recovered cost of $0.16 for installation and engineering labor.

2 Costs are administrative, legal, engineering, and carrier service center labor costs.

3 ARMIS factor is for United–Total Company. No ARMIS data is available for United of Pennsylvania.

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UTSE EI OVERHEAD ANALYSIS

	EI OVERHEAD FACTORS	UNITED's CALCULATION			FCC's CALCULATION			
	SOUTHEAST – TENNESSEE AND VIRGINIA	OVERHEAD FACTOR	RATE	DIRECT COST	OVERHEAD FACTOR	DIRECT COST	RATE ADJ FACTOR	COMMENTS
1	CONDUIT SPACE	1.37	$0.48	$0.35	1.43	$0.34		NOTE 1
2	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	1.34	$3.30	$2.47	1.39	$2.37		NOTE 1
3	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	1.33	$27.30	$20.45	1.39	$19.60		NOTE 1
4	CONDUIT SPACE, FIX --BRISTOL TN-SIXTH	1.42	$77.44	$54.58	2.07	$37.43	88.17%	
5	--JOHNSON CITY TN-ROAN	1.42	$63.49	44.75	2.07	$30.69	88.18%	
6	--JOHNSON CITY TN-KINGSPORT	1.42	$125.35	$88.35	2.07	$60.59	88.18%	
7	--KINGSPORT TN-COMMERCE	1.42	$39.58	$27.90	2.07	$19.13	88.19%	
8	--MIDWAY TN	1.42	$76.03	$53.59	2.07	$36.75	88.18%	
9	--BRISTOL VA	1.42	$77.44	$54.58	2.07	$37.43	88.17%	
10	--WYTHEVILLE VA	1.42	$54.92	$38.71	2.07	$26.55	88.18%	
11	ROOF SPACE --BRISTOL TN-SIXTH	1.42	$2.73	$1.92	2.07	$1.32	88.15%	
12	--JOHNSON CITY TN-ROAN	1.42	$2.24	$1.58	2.07	$1.08	88.16%	
13	--JOHNSON CITY TN-KINGSPORT	1.42	$4.33	$3.05	2.07	$2.09	88.16%	
14	--KINGSPORT TN-COMMERCE	1.43	$1.44	$1.01	2.07	$0.70	88.15%	
15	--MIDWAY TN	1.42	$2.68	$1.89	2.07	$1.29	88.15%	
16	--BRISTOL VA	1.42	$2.73	$1.92	2.07	$1.32	88.15%	
17	--WYTHEVILLE VA	1.42	$1.93	$1.36	2.07	$0.93	88.30%	
18	XMTR/RCVR SPACE --BRISTOL TN-SIXTH	1.42	$3.87	$2.73	2.07	$1.87	88.19%	
19	--JOHNSON CITY TN-ROAN	1.42	$3.17	$2.24	2.07	$1.53	88.29%	
20	--JOHNSON CITY TN-KINGSPORT	1.42	$6.27	$4.42	2.07	$3.03	88.14%	
21	--KINGSPORT TN-COMMERCE	1.42	$1.98	$1.39	2.07	$0.96	88.14%	
22	--MIDWAY TN	1.42	$3.80	$2.68	2.07	$1.84	88.21%	
23	--BRISTOL VA	1.42	$3.87	$2.73	2.07	$1.87	88.19%	
24	--WYTHEVILLE VA	1.42	$2.75	$1.94	2.07	$1.33	88.01%	
25	FLOOR SPACE --BRISTOL TN-SIXTH	1.42	$3.87	$2.73	2.07	$1.87	88.19%	
26	--JOHNSON CITY TN-ROAN	1.42	$3.17	$2.24	2.07	$1.53	88.29%	
27	--JOHNSON CITY TN-KINGSPORT	1.42	$6.27	$4.42	2.07	$3.03	88.14%	
28	--KINGSPORT TN-COMMERCE	1.42	$1.98	$1.39	2.07	$0.96	88.14%	
29	--MIDWAY TN	1.42	$3.80	$2.68	2.07	$1.84	88.21%	
30	--BRISTOL VA	1.42	$3.87	$2.73	2.07	$1.87	88.19%	
31	--WYTHEVILLE VA	1.42	$2.75	$1.94	2.07	$1.33	88.01%	
32	DC POWER --BRISTOL TN-SIXTH	1.43	$0.43	$0.30	2.06	$0.21	88.39%	
33	--JOHNSON CITY TN-ROAN	1.42	$0.27	$0.19	2.09	$0.13	87.27%	
34	--JOHNSON CITY TN-KINGSPORT	1.42	$0.37	$0.26	2.05	$0.18	89.16%	
35	--KINGSPORT TN-COMMERCE	1.42	$0.54	$0.38	2.06	$0.26	87.84%	
36	--MIDWAY TN	1.42	$1.85	$1.30	2.07	$0.89	88.01%	
37	--BRISTOL VA	1.43	$0.43	$0.30	2.06	$0.21	88.39%	
38	--WYTHEVILLE VA	1.38	$0.36	0.26	2.05	$0.18	89.10%	

ARMIS FACTOR	1.8243

NOTES:
1 Costs include double recovered cost of for installation and engineering labor.

4657

DIRECT COST RATE ADJUSTMENT FACTORS

COMPANY	EI RATE ELEMENT	RATES		RATE ADJ FACTOR
		COMPANY'S CALCULATION	FCC'S CALCULATION	
BATR	OCCUPANCY FEE PER SQ FT	$3.22	$2.05	63.66%
BSTR	SPACE CONSTRUCTION NRC	$51,660.00	$36,200.00	70.07%
GTCA	BUILDING MODIFICATION-SIMPLE NRC	$17,270.00	$13,508.00	78.22%
	BUILDING MODIFICATION-MODERATE NRC	$28,781.00	$22,512.00	78.22%
	BUILDING MODIFICATION-COMPLEX NRC	$44,910.00	$34,894.00	77.70%
GTFL	BUILDING MODIFICATION-SIMPLE NRC	$13,376.00	$9,921.00	74.17%
	BUILDING MODIFICATION-MODERATE NRC	$22,294.00	$16,536.00	74.17%
	BUILDING MODIFICATION-COMPLEX NRC	$34,555.00	$25,631.00	74.17%
GTHI	BUILDING MODIFICATION-COMPLEX NRC	$42,703.00	$35,402.00	82.90%
GTID	BUILDING MODIFICATION-COMPLEX NRC	$33,775.00	$26,784.00	79.30%
GTIL	BUILDING MODIFICATION-SIMPLE NRC	$14,882.00	$11,268.00	75.72%
	BUILDING MODIFICATION-MODERATE NRC	$22,981.00	$17,404.00	75.73%
	BUILDING MODIFICATION-COMPLEX NRC	$43,740.00	$33,115.00	75.71%
GTKY	BUILDING MODIFICATION-MODERATE NRC	$22,345.00	$18,508.00	82.83%
GTMI	BUILDING MODIFICATION-COMPLEX NRC	$32,780.00	$25,253.00	77.04%
GTOH	BUILDING MODIFICATION-SIMPLE NRC	$16,103.00	$11,942.00	74.16%
	BUILDING MODIFICATION-MODERATE NRC	$26,840.00	$19,904.00	74.16%
	BUILDING MODIFICATION-COMPLEX NRC	$41,602.00	$30,852.00	74.16%
GTTX	BUILDING MODIFICATION-SIMPLE NRC	$13,240.00	$10,634.00	80.32%
	BUILDING MODIFICATION-MODERATE NRC	$22,066.00	$17,724.00	80.32%
	BUILDING MODIFICATION-COMPLEX NRC	$34,202.00	$27,472.00	80.32%
GTWA	BUILDING MODIFICATION-MODERATE NRC	$25,679.00	$20,768.00	80.88%
COIL	BUILDING MODIFICATION-SIMPLE NRC	$13,904.00	$10,936.00	78.65%
	BUILDING MODIFICATION-MODERATE NRC	$23,175.00	$18,226.00	78.65%
COVA	BUILDING MODIFICATION-SIMPLE NRC	$13,596.00	$11,664.00	85.79%
	BUILDING MODIFICATION-MODERATE NRC	$21,544.00	$18,486.00	85.82%
UTFL	CONDUIT SPACE	$0.57	$0.54	95.54%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.70	$3.36	90.86%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$31.00	$28.28	91.16%
UTIN	CONDUIT SPACE	$0.62	$0.59	95.96%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$4.00	$3.67	91.85%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$33.20	$30.56	92.04%
UTMW	CONDUIT SPACE	$0.55	$0.53	95.65%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.60	$3.30	91.71%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$30.10	$27.68	91.97%
UTNC	CONDUIT SPACE	$0.57	$0.54	95.56%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.60	$3.27	90.78%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$30.30	$27.60	91.10%
UTOH	CONDUIT SPACE	$0.55	$0.53	95.52%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.50	$3.19	91.06%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$29.50	$26.97	91.42%
UTEG	CONDUIT SPACE	$0.60	$0.57	95.65%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.80	$3.46	91.01%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$31.40	$28.61	91.13%
UTSE	CONDUIT SPACE	$0.48	$0.46	95.16%
	CROSS-CONNECT DS1 PHYSICAL OR VIRTUAL	$3.30	$3.00	90.82%
	CROSS-CONNECT DS3 PHYSICAL OR VIRTUAL	$27.30	$24.86	91.06%

COMPUTATION OF OVERHEAD RATIO

1992 SPECIAL ACCESS ARMIS DATA

124	CALC Factor: GSF excl L&B as % of tot GSF (flb)	0.3930		XYZ COMPANY
125	CALC Factor for GSF as % of TPIS (fgsf)	0.2245		
	CALC ROR factor for SLIT	0.6300		
126				
127	1410 TotCOE36/69	$415,819		
128	1440 TotIOTEquip36/69	$163		
129	1530 TotC&WF36/69	$223,417		
130	Total Direct Plant	$639,399		
131	CALC 2020 Tot Cap Lease excl. GSF	$0		
132	CALC 2130 Lease Improv excl. GSF	$0		
133	CALC 2250 FCC Inv Adj less GSF	$1,001		
134	Total Direct Investment	$640,400		
135				
136	CALC 1000 GSF excl. L&B	$72,739		
137	CALC 2001 GSF Cap Lease excl. L&B	$945		
138	CALC 2070 GSF Leas Improv excl. L&B	$1,200		
139	CALC 2250 FCC Inv Adj for GSF less L&B	$114		
140	Tot GSF Investment less L&B	$74,998		
141	2160 IntanAss36/69	$0		
142	2190 PHFTU36/69	$47		
143	2191 TPUCShort36/69	$6,998		
144	2224 TotInvtr36/69	$3,255		
145	2230 CWC35/65/69	($8,799)		
146	Overhead Inv other than GSF	$3,499		
147	Tot Overhead Inv (incl. GSF)	$78,497		
148				
149	CALC 3080 Tot Acc Dep Less GSF & PHFTU	$262,061		
150	CALC 3150 Amort Tang Assets less GSF	$0		
151	CALC 3220 Amort Lease Impr less GSF	$0		
152	CALC 3340 Current DOIT less GSF	$77,433		
153	CALC 3410 Non-Cur DOIT less GSF	$0		
154	3421 FCCReserveAdj65 excl. GSF	$1,411		
155	CALC 3422 Cust Dep Less Attrib to GSF	$822		
156	3423 OtherDefCrs36/69 excl. GSF	$1,007		
157	Direct Credits	$342,733		
158				
159	CALC 3010 GSF Acc Dep Less L&B	$24,865		
160	3070 Acc Dep for PHFTU36/69	$5		
161	CALC 3090 GSF Amort Capital Lease Less L&B	$545		
162	CALC 3160 GSF Amort Lease Impr less L&B	$685		
163	3260 Amort Intang Assets	$6		
164	CALC 3280 Current GSF DOIT less L&B	$7,725		
165	CALC 3360 Non-Cur GSF DOIT less L&B	$0		
	3421 FCCReserveAdj65 for GSF less L&B	160.47389745651		
166	CALC 3422 Cust Dep Attrib to GSF Less L&B	$94		
	3423 OtherDefCrs36/69 for GSF excl. L&B	$115		
167	Overhead Credits	$34,180		
168				
169	Net Direct Inv	$297,667		
170	Net Return on Direct Inv	$33,488		
171				
172	Net Overhead Inv	$44,317		
173	Net Return on Overhead Inv	$4,986		
174				
175	5026 TotCOExp36/69	$20,375		
176	5060 TotIOTExp36/69	$23		
177	5076 TotC&WFExp36/69	$14,395		
178	Direct Plant Specific Expenses	$34,793		
179				
180	5000 NetworkSupp36/69	$377		
181	CALC 5010 GeneralSupp36/69Excl L&B	$10,933		
182	6000 OtherPP&E36/69	$125		Assume All Overhead; no excl. for L&B
183	6010 NetworkOper36/69	$0		Assume included in separate EI charges
184	Overhead Plant Specific Expenses	$11,435		
185				
186	CALC 6090 Dep Exp excl. GSF and PHFTU	$50,426		
187	CALC 6160 Cap Lease Amort. excl. GSF	$0		
188	CALC 6230 Lease Improv excl GSF	$0		
189	Direct Depreciation Expenses	$50,426		
190				
191	CALC 6020 GSF Dep Exp excl. L&B	$4,337		
192	6080 PHFTU Dep Exp	$0		
193	CALC 6100 GSF Cap Lease Amort. excl. L&B	$111		
194	CALC 6170 GSF Lease Improv excl. L&B	$127		
195	6254 TotOther36/69	$394		Assume All Overhead; no excl. for L&B
196	Overhead Depreciation Expenses	$4,969		
197				
198	7000 Cust Op Exp Cat 1 TotMktng36/69	$10,998		
199	7060 Cust Op Exp Cat 2a TotTelOp36/69	$0		
200	7076 Cust Op Exp Cat 2b TotPubDir36/69	$0		

COMPUTATION OF OVERHEAD RATIO

1992 SPECIAL ACCESS ARMIS DATA

227	7220 Cust Op Exp – Cat 2c1 – Loc Bus Off Exp	$17,274		XYZ COMPANY
241	7290 Cust Op Exp – Cat 2c2 – Rev Acctg	$772		
243	7300 3 OthCustSvc36/69	$851		
	Total Cust Op Exp	$29,895		
245	7331 Corp Op Exp	$36,972	assume all overhead	
	Total Other Overhead Expenses	$68,867		
246				
247	CALC 7350 FCCExpenseAdj65 less GSF	$39		
248	CALC 7350 FCCExpenseAdj65 for GSF less L&B	$4		
249				
250	Total Direct Expenses	$85,258		
251	Total Overhead Expenses	$83,275		
252				
253	CALC 8000 SLIT for direct costs	$1,617		
	FIT on Direct Net Return	$9,294		
	Total Direct Taxes	$10,912		
254				
255	CALC 8000 SLIT for overheads	$241		
256	8005 TotOthSt&Lcl69	$14,199	Treat as no L&B	
	FIT on Overhead Net Return	$1,384		
	Total Overhead Taxes	$15,824		
	Calculation of SLIT:			
	GSF–Direct Inv	$185,107		
	Other Overheads–Direct Inv	$3,499		
	GSF and Other Overheads – Dir Inv	$188,606		
	GSF (excl. L&B) and Oth Over – Dir. Inv.	$78,497		
	Ratio	2.4027		
	Net Overhead Inv excl. L&B	$44,317		
	Est Net Overhead Inv incl. L&B	$106,481		
	Net Direct Investment	$297,667		
	SLIT	$3,485		
	SLIT at 11.25 ROR	$2,196		
	SLIT for Overheads incl. L&B	$578		
	SLIT for Overheads excl. L&B	$241		
	SLIT for Net Direct Inv.	$1,617		
257				
258	Calculation of FIT factor:			
259	Total Net Return at 11.25%	$38,473		
260	Fixed Charges	$11,795		
261	Amort of ITC & Adj	$2,023		
262	Adjusted Net Return	$24,655		
263	FIT Gross–Up Factor	0.515152		
264	Gross FIT	$12,701		
265	Amort of ITC & Adj	$2,023		
266	Net FIT	$10,678		
267	FIT Factor	0.277548		
274				
275	Total Direct Revreq	$129,657		
276	Total Overhead Revreq	$104,085		
277	Overhead Ratio	1.8026		

APPENDIX D

GSF Adjustment

RECALCULATION OF RAF TO REFLECT REVISED ARMIS FACTOR

This Appendix provides instructions to the companies on the method to be used to compute their revised rate adjustment factors (RAFs) to correct for the General Support Facilities (GSF) misallocation. The attached chart gives the direct revenue requirement and the overhead revenue requirement for the Special Access category, as derived from 1992 ARMIS data, in columns a and b, respectively. Column e reports the ARMIS overhead factor used to determine the RAFs for the companies, prior to correction of the GSF misallocation.

All companies shall recompute their ARMIS overhead factors using the formula given on the chart for column f. This ARMIS factor excluding GSF must then be compared with the FCC's calculation of the company's overhead factor in Appendix C. If the revised ARMIS factor is less than the FCC's calculation of the company's overhead factor, the RAFs in Appendix C must be recalculated to equal the ratio of the revised ARMIS factor to the FCC's calculation of the company's overhead factor. These recalculated RAFs should then be applied to the company's filed rates as displayed in Appendix C.

REVISED ARMIS FACTOR TO REFLECT NEW GSF ALLOCATION

	Direct Revenue Requirement a	Overhead Revenue Requirement b	GSF excluding Land & Bldg as % of total GSF c	Special Access Cost Change due to GSF Reallocation d	ARMIS Factor e	ARMIS Factor excluding GSF f
Ameritech	$129,657	$104,085	39.30%		1.8028	
Bell Atlantic	$226,679	$119,850	49.85%		1.5287	
Bell South	$167,649	$88,483	49.23%		1.5278	
NYNEX	$190,442	$150,264	35.74%		1.7890	
Pacific Bell	$103,775	$76,254	50.50%		1.7348	
Nevada Bell	$1,844	$1,267	39.39%		1.6873	
Southwestern	$122,722	$75,646	39.73%		1.6164	
US West	$95,252	$80,762	50.75%		1.8479	
Centel Florida	$2,170	$2,328	43.40%		2.0731	
Centel Illinois	$1,976	$2,485	45.10%		2.2578	
Centel North Carolina	$1,118	$1,066	45.77%		1.9534	
Centel Nevada	$2,554	$2,256	44.28%		1.8833	
Centel Virginia	$1,420	$1,212	45.91%		1.8537	
Cincinnati Bell	$8,178	$8,082	39.71%		1.9882	
Contel Illinois	$749	$742	44.21%		1.9907	
Contel Virginia	$1,443	$1,999	41.37%		2.3848	
GTE California	$11,554	$14,242	44.93%		2.2326	
GTE Florida	$11,667	$8,229	48.73%		1.7053	
GTE Hawaii	$5,212	$6,719	42.24%		2.2891	
GTE Idaho	$1,043	$627	48.39%		1.6016	
GTE Illinois	$4,917	$4,072	40.64%		1.8282	
GTE Kentucky	$4,063	$2,849	45.46%		1.7012	
GTE Michigan	$2,111	$1,742	45.30%		1.8252	
GTE Oregon	$2,347	$2,096	42.53%		1.8931	
GTE Texas	$11,314	$9,551	43.61%		1.8442	
GTE Washington	$3,256	$3,562	43.43%		2.0940	
Lincoln	$1,564	$727	46.61%		1.4648	
Rochester	$4,429	$2,788	51.38%		1.6294	
SNET	$18,583	$15,392	55.67%		1.8283	
United Florida	$7,514	$3,678	39.22%		1.4895	
United Indiana	$1,081	$922	46.18%		1.8529	
United Midwest	$932	$703	46.84%		1.7546	
United North Carolina	$6,696	$3,369	32.58%		1.5032	
United Ohio	$3,894	$3,137	47.85%		1.8055	
United Eastern Group	$22,596	$13,781	41.59%		1.6099	
United Southeast	$1,748	$1,441	44.34%		1.8243	

NOTES: Columns a and b are derived from Special Access category data for 1992 in ARMIS 43-04
Column c is derived from Special Access category data for 1992 in ARMIS 43-03
Column d: for price cap companies, the exogenous change amount fo special access which will be reported in the company's GSF compliance filing of June 17; for rate of return companies, the analogous amount.
Column e = 1 + (column a / columm b)
Column f = 1 + ([col b - (col c * col d)] / col a)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Further Cost Allocation Uniformity — AAD 92-42

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1993; Released: July 1, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On October 15, 1992, the Common Carrier Bureau (Bureau) released an *Order Inviting Comments*,[1] in which it proposed cost allocation uniformity practices for local exchange carriers (LECs) who file cost allocation manuals (CAMs). Specifically, we proposed to (1) clarify the distinctions among apportionment methods; (2) specify cost pools and allocation procedures for ten accounts; and (3) specify implementation procedures. Seventeen comments and eleven replies were filed.[2] In this Order, we adopt our proposals with modifications as discussed in the succeeding paragraphs.

2. The Bureau was directed to initiate this proceeding in the *Computer III Remand Order* [3] in order to strengthen the Commission's nonstructural safeguards for enhanced services and other nonregulated offerings. The Commission directed the Bureau to develop ways to obtain greater uniformity in LEC cost allocation practices, and to promulgate uniformity requirements.[4] We decided the best way to accomplish this would be to propose minimum cost pool requirements and specific allocation procedures for ten Part 32 accounts which contain large amounts of nonregulated costs.[5]

3. The Commission's cost allocation procedures for separating the costs of regulated services from nonregulated services were established in the *Joint Cost Order*.[6] The primary purpose was to assure that regulated activities do not cross-subsidize nonregulated activities. The Commission established two separate but complementary sets of rules, one which governs how carriers allocate their costs between regulated and nonregulated activities,[7] and the other which governs transactions between carriers and their affiliates.[8] To implement these rules, the Commission required LECs with $100 million or more in annual operating revenue to file CAMs that set forth their cost allocation procedures.[9] The CAMs describe the carriers' nonregulated activities, list the activities the carriers treat as incidental activities, and provide information on the carriers' affiliate transactions, employee time reporting procedures, and cost apportionment methods.

4. The Commission requires that each CAM show, for Part 32 revenue requirement accounts, the carrier's cost pools, the procedures used to place costs into these cost pools, and the basis on which each cost pool is apportioned between regulated and nonregulated activities.[10] Cost pools are comprised of logical, homogeneous groupings of costs that maximize the extent to which cost-causative allocation factors can be used to divide the costs between regulated and nonregulated activities. Cost pools can be dedicated exclusively to either regulated or nonregulated activities, or they can contain common costs which must be apportioned between regulated and nonregulated activities.[11]

II. DISCUSSION

A. General

5. Several LECs argue that it is inappropriate to require absolute uniformity in the cost allocation procedures, because the LECs provide different products and services and have different organizational structures. They maintain that the Bureau's attempt to establish CAM uniformity may actually result in less cost-causative and more costly allocation methods.[12] MCI disagrees, arguing that the primary business of all LECs is the provision of local exchange services. MCI believes that CAM uniformity will eliminate a variable that impedes analysis by establishing the same rules for all carriers.[13] The New York Department of Public Service (NYDPS) believes we need to provide more detail regarding the cost allocation procedures in order that the LECs' actual cost allocations will be more uniform.[14]

6. When the Commission adopted the joint cost rules, it determined that the carriers should use individually-designed CAMs to reflect their unique operational characteristics. Through our audit and review process we have found that, given our budgetary constraints, additional uniformity in the CAMs is necessary in order for us to provide more effective oversight. We do not believe LEC operations need to be identical in order for us to require more CAM uniformity. In this proceeding, we selected areas in which the LECs' operations are very similar and their current

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[1] Implementation of Further Cost Allocation Uniformity, 7 FCC Rcd 6688 (1992) (*Order Inviting Comments*).

[2] The list of parties filing Comments and Replies can be found in Appendix A.

[3] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, *Report and Order*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*Computer III Remand Order*), *recon. pending*.

[4] *Computer III Remand Order*, 6 FCC Rcd at 7584-85.

[5] Uniform System of Accounts for Telecommunications Companies (USOA), 47 C.F.R. Part 32.

[6] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298, 1300 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Corp. Bell v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[7] 47 C.F.R. §§32.23, 64.901.

[8] 47 C.F.R. §§32.27, 64.902.

[9] *Computer III Remand Order*, 6 FCC Rcd at 7642-43 (adopting Section 64.903 of the Commission's rules); *Joint Cost Order*, 2 FCC Rcd at 1326-29.

[10] *Computer III Remand Order*, 6 FCC Rcd at 7642; *Joint Cost Order*, 2 FCC Rcd at 1328.

[11] *Id.* at 1319.

[12] Pacific Comments at 5-8; GTE Comments at 3-5.

[13] MCI Comments at 7.

[14] NYDPS Comments at 3.

CAM differences are more attributable to individual preferences than differing operational characteristics. Therefore, we will adopt minimum CAM uniformity requirements, as specified below. These requirements provide additional cost allocation detail that should satisfy the concern raised by NYDPS.

B. Distinctions Among Apportionment Methods

7. *Proposal.* In the *Order Inviting Comments*, we proposed that all LECs revise their CAMs to the extent necessary to distinguish properly among direct assignment, direct attribution, and indirect attribution. We proposed to clarify these standards and guidelines as follows: (1) direct assignment occurs when the costs are incurred in providing either regulated service exclusively or nonregulated service exclusively; (2) direct attribution occurs when common costs are allocated between regulated and nonregulated activities based on direct measures of cost-causation or direct analysis of the origin of the cost themselves; and (3) indirect attribution occurs when common costs are allocated between regulated and nonregulated activities based on indirect measures of cost-causation.

8. *The Parties' Positions.* LECs are concerned that our proposal will shift costs from directly assigned to directly attributed in the Automated Reporting Management Information System Report 43-03 (ARMIS Joint Cost Report).[15] Further, several LECs contend that implementation should be phased-in and should apply only to the accounts for which uniform cost pools and costing methodologies are adopted. They state that flash-cut implementation of these definitions for all accounts would result in multiple changes for the majority of accounts, with possible separations and ratemaking impacts.[16] Also, the LECs question the need for a distinction between direct and indirect attribution of costs. They argue that such a distinction could result in misunderstandings and is inconsistent with the ARMIS Joint Cost Report.[17] Finally, BellSouth and Pacific believe that if a portion of an asset is identifiable as exclusively regulated or nonregulated, it should be characterized as directly assigned.[18]

9. *Discussion.* Our goal is to clarify distinctions between direct assignment, direct attribution, and indirect attribution. Such distinctions are necessary to assure that LECs apply these definitions uniformly in their CAMs. Phasing-in implementation, as some LECs suggest, is contrary to this goal. The Commission requires that costs be directly assigned or directly attributed in a cost-causative manner, before indirect allocators are used. Therefore, for CAM purposes we will continue to preserve this cost allocation hierarchy. For reporting purposes, however, we intend to amend the ARMIS Joint Cost Report by combining the directly assigned and directly attributed categories into one category, thus eliminating the LECs' concern that this report will reflect shifts between directly assigned and directly attributed. We will amend this report prior to the required filing date of the affected data.[19] Further, we disagree with BellSouth's and Pacific's interpretation of exclusive use. Under our definition of direct assignment, an individual asset is considered one undivided unit. Therefore, direct assignment of an asset can only occur when an entire asset is used exclusively for regulated activities or when an entire asset is used exclusively for nonregulated activities.

C. Disaggregation of Cost Pools

10. *Proposal.* In the *Order Inviting Comments* we stated that the proposed allocation procedures are intended to be minimum requirements. Further disaggregation of cost pools would be permitted when it would achieve greater precision in the allocation of costs. We proposed that such further disaggregation could be achieved by subdividing the required cost pools into sub-pools provided that the apportionment procedures are consistent with our required procedures. We also proposed that the use of sub-pools be disclosed in the cost apportionment table of the CAM.

11. *The Parties' Positions.* Several parties support our proposal for the use of sub-pools, and believe that sub-pools will provide meaningful information regarding further disaggregation of cost pools and that such use is essential in order to provide accurate allocations.[20] United agrees with the use of sub-pools, however, it believes including sub-pools in the CAM would complicate the CAM process and serve no useful purpose.[21] BellSouth believes the Bureau should only require the disclosure of those sub-pools which impact the cost allocation process. BellSouth states that the disclosure of sub-pools used internally for management purposes may divulge competitively sensitive information, and would provide no useful information as to a carrier's cost allocation processes.[22]

12. *Discussion.* We are adopting our proposal to permit carriers to divide prescribed cost pools into sub-pools so long as the disaggregation will achieve greater precision in the allocation of costs and the sub-pools are apportioned using procedures that are consistent with those prescribed for the cost pool to which the sub-pool relates. Although we initiated this proceeding to establish a greater degree of uniformity among the cost allocation methods used by the carriers, we do not want our prescribed procedures to be so rigid as to prevent the establishment of sub-pools that would improve the allocations. We believe, however, that the CAMs should state that carriers have established sub-pools and should describe the sub-pools and the apportionment procedures used for the sub-pools. The inclusion of these additional sub-pools in the CAM will ensure adequate disclosure of the carriers' cost allocation practices. Sub-pools created for internal management purposes which have no impact on regulated and nonregulated activities within an account need not be disclosed.

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[15] USTA Comments at 3; GTE Comments at 10; U S West Comments at 3.

[16] USTA Comments at 4; BellSouth Comments at 7-8; U S West Comments at 3.

[17] USTA Comments at 4-5; BellSouth Comments at 8-9; CBT Comments at 8-9, GTE Comments at 11-12; NYNEX Comments at 4-5; Southwestern Comments at 7-8.

[18] BellSouth Comments at 6-7, 10-11; GTE Comments at 11; NYNEX Comments at 4; Pacific Comments at 10; Southwestern Comments at 8; CBT Replies at 3-4.

[19] *See* para. 42 *infra*.

[20] U S West Comments at 2; GVNW Comments at 1; NYDPS Comments at 4; Southwestern Comments at 8-9; USTA Replies at 2.

[21] United Comments at 3-4.

[22] BellSouth Comments at 9; BellSouth Replies at 5-6.

D. Account Proposals

13. In this section we discuss matters related to the ten accounts selected for CAM uniformity. We discuss these accounts in the same sequence as they were discussed in the *Order Inviting Comments*. The specific cost pools and allocators for these accounts are presented in Appendix B by account in numerical order.

General

14. Some of the commenting parties note that the allocators proposed in the *Order Inviting Comments* for the network operations cost pools in Account 2121, Buildings, and Account 2112, Motor vehicles, include circular definitions. Circularity occurs, for example, when the account to be allocated is included in a group of accounts used to make the allocation. Regarding Accounts 2121 and 2112, we proposed to allocate the network operations cost pools based on the corresponding expense accounts (Account 6121 for buildings and Account 6112 for motor vehicles), which in turn would be allocated based, in part, on the network operations cost pool.[23] We have amended the network operations cost pools to exclude the inappropriate accounts, thereby eliminating the circularity. In addition, we proposed to allocate these cost pools based on salaries and wages, and we included some accounts in the allocator which do not contain salaries and wages. NYDPS suggests that we make it clear that the accounts used to apportion network operations should exclude accounts which do not have salaries and wages, such as access, depreciation, and amortization (Accounts 6540, and 6561-6565).[24] We agree and have made the necessary modifications.

15. MCI believes that we should include four additional accounts in this proceeding which it believes would extend the benefit of uniformity.[25] Although it may be possible to establish uniform CAMs for these four accounts, we cannot do so in this proceeding. Establishing CAM uniformity for an account would require a considerable amount of study to determine the uniform cost pools and cost allocation factors that would be most effective in preventing cross-subsidies while being practical for all LECs to implement. Neither MCI nor any other party offered specific recommendations on any of these issues for these four accounts. Therefore, we will defer consideration of these accounts at this time.

Account 2121, Buildings

16. *In the Order Inviting Comments* we proposed that investment in the Buildings Account be apportioned in accordance with the functional use of the buildings themselves. To accomplish this, we proposed two direct cost pools (regulated and nonregulated) and six common cost pools (non-telecommunications, central office, distribution services, network operations, customer operations, and corporate operations). To apportion building investment to the common cost pool functions, we proposed that LECs use floor space studies which would be updated annually and whenever significant changes occur in the building functions. We proposed that the non-telecommunications cost pool be directly attributed to nonregulated, that the central office cost pool be apportioned based on central office investment, and that the remaining common cost pools be apportioned based on the related salaries and wages.

a. Non-telecommunications

17. Several LECs suggest that the non-telecommunications cost pool is unnecessary and should be eliminated. They argue that costs of buildings used for non-telecommunications should either be treated as incidental activities and assigned to regulated[26] or should be removed from the Telecommunications Plant Accounts.[27] We find, however, that this cost pool is necessary. Under Section 32.4999(l)[28] there is a limit on activities that can be treated as incidental, and under Section 32.23(c)[29] costs associated with activities that involve the joint use of assets must be accounted for in the regulated accounts. Thus, the non-telecommunications cost pool is needed for costs that do not qualify as incidental and must be accounted for in the regulated accounts. To provide more clarity, however, we have changed the name of this cost pool from non-telecommunications to nonregulated.

b. Space Rented to Others

18. Several parties state that we need to add a common cost pool for space rented to others that would be attributed to regulated.[30] They believe this is necessary for incidental activities and for tariffed leasing activities such as those associated with expanded access interconnection.[31] We agree and will add a directly attributed to regulated cost pool for this purpose.

c. Floor Space Studies

19. *Parties' Positions.* BellSouth opposes the use of an annual floor space study to apportion costs to the common cost pools. It argues that such a study would be burdensome and costly and that it currently uses mechanized floor space records which are updated monthly and thus, are more precise.[32] GTE argues that it would be extremely costly for it to prepare annual floor space studies of its more than 12,000 buildings. It suggests that we add a common - multi-use building cost pool that would be apportioned based on a composite of the other common cost pools.[33]

20. *Discussion.* We have decided to adopt our proposal that building costs be assigned to the various functions based on floor space studies that are to be updated at least annually because we believe this is necessary to achieve

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[23] USTA Comments at 12; Bell Atlantic Comments at 4; CBT Comments at 9; Pacific Comments at 13,15; U S West 8.

[24] NYDPS Comments at 4-5.

[25] The four accounts are: Account 2124, General Purpose Computers; Account 6124, General Purpose Computer Expense; Account 2212, Digital Electronic Equipment; and Account 6212, Digital Electronic Equipment Expense. MCI Comments at 5.

[26] BellSouth Comments at 11; GTE Comments at 7-8; NYDPS Comments at 4; Pacific Comments at 8; Southwestern Comments at 10-11.

[27] United Comments at 5; CBT Comments at 2.

[28] 47 C.F.R. §32.4999(l).

[29] 47 C.F.R. §32.23(c).

[30] USTA Comments at 11; Bell Atlantic Comments at 1,3-4; CBT Comments at 2; NYNEX Comments at 7; Pacific Comments at 8-9; United Comments at 5; U S West Comments at 7-8.

[31] *See* Expanded Interconnections with Local Telephone Facilities; 23 FCC Rcd 7369 (1992).

[32] BellSouth Comments at 11-12.

[33] GTE Comments at 8-9.

accurate results. We believe that all LECs have the resources to implement this requirement. If, on the other hand, GTE believes its circumstances make it impractical to comply with the proposed rule, it should seek relief through the waiver process. BellSouth's use of a mechanized system which updates its floor space apportionments monthly exceeds the requirement for annual floor space studies and, thus, is acceptable.

d. Functional Use of Buildings

21. *Parties' Positions.* Pacific states that it does not track salaries and wages by building, therefore, it would be difficult to implement the proposed salaries and wages allocators. According to Pacific, it has two options: (1) it could assign all building investment to common cost pools; or (2) it could make costly changes to its recordkeeping of salary and wage data in order to identify the buildings where employees work.[34]

22. *Discussion.* We reject Pacific's first option to assign all building investment to common cost pools. This option is contrary to the Commission's requirements that costs shall be directly assigned whenever possible. Therefore, buildings dedicated entirely to regulated or nonregulated activities must be directly assigned. As to Pacific's second option, we agree that recordkeeping changes may be required. When salaries and wages are used to allocate common building cost pools, the salaries and wages related to directly assigned buildings must be excluded. Otherwise the allocations will yield distorted results.[35] We believe that Pacific's concerns about the need for costly recordkeeping changes are overstated. We believe that most buildings will not meet the test of exclusively regulated or exclusively nonregulated, and will therefore be assigned to the common cost pools. Thus, Pacific will need to implement recordkeeping for those relatively few buildings which are dedicated to regulated or nonregulated activities.

Account 2111, Land

23. *Proposal and Parties' Positions.* In the *Order Inviting Comments* we proposed the same cost pool structure for land as we did for buildings. That is, we proposed an item-by-item assignment or apportionment of individual parcels of land into one of eight cost pools, two directly assigned and six common pools. Then the six common cost pools were to be allocated between regulated and nonregulated activities based upon the allocation of the respective common building cost pools. Several LECs argue that the use of eight cost pools for land would be burdensome and unnecessary. They contend that land not directly assigned should be apportioned based on the relative investment in buildings (Account 2121).[36]

24. *Discussion.* We proposed the same cost pool structure for land as we did for buildings because we believed it was necessary to do so in order to provide an accurate result. We have reviewed carrier data and concluded there is only a minimal difference between apportioning the common land investments item-by-item and apportioning them based upon the overall investment in common building investments. As a result, we will require only three cost pools for land: directly assigned to regulated, directly assigned to nonregulated, and common. The common pool shall be apportioned based on the overall investment in the common building cost pools.

Account 6121, Land and Building Expense

25. *Proposal.* This account includes expenses associated with land and buildings.[37] In the *Order Inviting Comments* we proposed two directly assigned cost pools (regulated and nonregulated) and two common cost pools (operating rents,[38] and other). We proposed that the operating rent cost pool be allocated based on an annual analysis of the rented space and that the other cost pool be allocated based on the aggregate of the common cost pools for land and buildings.

26. *Parties' Positions.* GTE and BellSouth believe that all common expenses should be aggregated into one cost pool and allocated based on the relative investment in buildings. Further, they state that it is unnecessary to have a separate cost pool for operating rents because it would require an additional study with no benefit.[39]

27. *Discussion.* We will require the use of two common cost pools for land and building expense: operating rents and other common expense. We cannot prescribe the use of a single common cost pool, as suggested by GTE and BellSouth, because we could identify no one allocation factor that is appropriate for both cost pools. We conclude that the "other common expense" pool should be allocated based on the sum of the common building cost pools, while the "operating rents" pool should be allocated based upon special studies, prepared at least annually, of the LEC's rental space. Allocation based upon the use of a LEC's building investment would not be appropriate here, because a LEC's use of space rented from others has no direct correlation to its use of its own buildings.

Account 2112, Motor Vehicles

28. In the *Order Inviting Comments* we proposed that LECs apportion this investment in accordance with the functional uses of the motor vehicles. To accomplish this, we proposed two directly assigned cost pools (regulated and nonregulated) and six common cost pools (central office, distribution services, network operations, customer operations, corporate operations, and motor pool). We pro-

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[34] Pacific Comments at 11-12.

[35] For example, assume we have two buildings with the salaries of Building A being entirely regulated and the salaries of Building B being half regulated and half nonregulated. Also assume that the total salaries of both buildings are equal. In this example, Building A would be directly assigned to regulated and Building B would be a common building. In this case it would be inappropriate to combine Building A salaries and Building B salaries to allocate the cost of Building B because that would result in three-fourths of Building B being allocated to regulated when in fact only half of Building B should be allocated to regulated.

[36] USTA Comments at 11; BellSouth Comments at 12; CBT Comments at 3; GTE Comments at 9; NYNEX Comments at 3-4; Pacific Comments at 12-13; Southwestern Comments at 11; United Comments at 5-6; U S West Comments at 7; Pacific Replies at 8.

[37] 47 C.F.R §32.6121.

[38] *See, e.g.,* Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109, 120 (1988)(*Bell Atlantic Order*).

[39] BellSouth Comments at 12; GTE Comments at 9-10.

posed that all investment in motor vehicles that is not used exclusively for regulated or nonregulated activities be placed in one of the common cost pools and apportioned based on the related salaries and wages. If a motor vehicle serves multiple functions, its investment would be assigned to the motor pool cost pool and apportioned based on the related salaries and wages. No one disagreed with our cost pool structure; therefore, we adopt it.

Account 6112, Motor Vehicle Expense

29. This is a clearing account for motor vehicle expense. That is, expenses are accumulated in this account for later disposition to other accounts such as construction projects or other plant-specific expense accounts. After clearances, a residual amount of motor vehicle expense may remain in this account. In the *Order Inviting Comments* we proposed that LECs apportion this remaining expense in accordance with the functional use of the motor vehicles. To accomplish this, we proposed two directly assigned cost pools (regulated and nonregulated) and one common cost pool to be allocated based on the relative investment in common motor vehicles excluding central office and distribution services motor vehicles. No one disagreed with our proposal; therefore, we adopt it.

Account 6362, Other Terminal Equipment; Account 6311, Station Apparatus Expense; and Account 6341, Large Private Branch Exchange Expense

a. Background

30. Most of the costs recorded in these accounts are technician labor costs. The same technicians that perform jobs relating to these accounts sometimes perform jobs related to other accounts such as the cable expense accounts. The work performed can be regulated, nonregulated, or a combination of both. Since the work performed can affect multiple accounts, analysis of the work performed by the technicians is essential to assign costs to the proper Part 32 accounts and to apportion these costs within the accounts. For each of these accounts, we proposed four directly assigned cost pools (regulated and nonregulated single purpose visits and regulated and nonregulated combination visits), and three common cost pools (combination travel, no access, and no trouble found).

31. USTA and the LECs oppose this proposal. They question the need for four directly assigned cost pools[40] or for a separate cost pool for combination travel,[41] and they believe costs associated with no access and no trouble found visits should be combined into one cost pool. We have considered their comments and agree that certain modifications are necessary.

32. We agree that there is no need to distinguish between directly assigned cost pools for single purpose visits and combination visits. Therefore, we will require only two directly assigned cost pools (regulated and nonregulated). In addition, we will require changes to how travel expenses are captured, thereby eliminating the need for a separate cost pool. We also will require only one cost pool for costs related to no access and no trouble found visits and we discuss how these costs should be allocated in a succeeding paragraph.

b. Travel Time

33. Travel time is incurred by a technician *en route* to and from a job site. To assign travel costs, we have developed the following methodology. Travel time related to single purpose visits (*i.e.*, those jobs that are all regulated or all nonregulated work) will be charged to the appropriate Part 32 accounts and identified as directly assigned regulated or directly assigned nonregulated. Travel time related to no access and no trouble found visits is to be assigned to the no access/no trouble found cost pool. Travel time related to combination visits is to be assigned 50 percent to regulated activities and 50 percent to nonregulated activities.

c. No Access/No Trouble Found

34. Technicians are frequently dispatched on no access or no trouble found visits. No trouble found visits occur when a technician is dispatched to correct trouble on a customer line and finds the line in working order. Such visits occur, for example, when the problem is intermittent. The technician has no basis to determine whether the problem that caused a no trouble found visit was regulated or nonregulated. No access visits occur when a technician is dispatched to a customer's premises to clear a trouble condition of unknown origin. Upon arrival, the technician finds no problem checking the network from outside the premises and cannot gain access to the premises to determine if the problem is on the customer, instead of the network, side of the demarcation point. As with no trouble found visits, the technician cannot determine whether the visit should be classified as regulated or nonregulated.

35. The LECs and USTA believe that no access and no trouble found should be combined into one cost pool and allocated based on productive labor hours.[42] We have two reservations about that proposal. First, we are reluctant to establish a single cost pool for no access and no trouble found because we believe the characteristics of no access and no trouble found require different allocators. We believe a greater percentage of no access visits should be assigned to nonregulated because, for these visits, the technician has already checked the network and found no problem and gaining access to the premises would primarily determine whether the visit was a no trouble found visit or a nonregulated customer premises visit. Second, we believe that productive labor hours is not a suitable allocator for no access and no trouble found; we believe trouble counts cleared is a more appropriate allocator because the number of no access and no trouble found visits is more directly related to the number of trouble counts cleared than to productive hours.

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[40] USTA Comments at 6-7; Ameritech Comments at 2-3; Bell Atlantic Comments at 2-3; BellSouth Comments at 13-16; CBT Comments at 4; GTE Comments at 6; NYNEX Comments at 3; Pacific Comments at 16-17; Rochester Comments at 1-2; Southwestern Comments at 5-7; United Comments at 12-13; U S West Comments at 5-6.

[41] Bell Atlantic at 2-3; BellSouth at 14-16; CBT at 6; GTE at 6-7; Pacific at 16-18; Rochester at 2-3; Southwestern at 5; U S West at 6-7; USTA at 8.

[42] USTA at 9-10; BellSouth at 17-18; CBT at 5; GTE at 6-7; NYNEX at 6-7; Pacific at 18-19; Rochester at 2-3; United at 11-12.

36. If we created separate cost pools for no trouble found and no access, we would allocate the no trouble found cost pool to regulated based on the proportion of regulated trouble counts cleared to total trouble counts cleared and to nonregulated based on the proportion of nonregulated trouble counts cleared to total counts cleared. For the no access cost pool, however, we would select an allocator which would be more heavily weighted towards nonregulated because in these cases the technician would have checked the regulated network up to the customers' premises. Despite our preference for separate cost pools for these visits, we recognize that establishing separate cost pools would place a burden on the carriers that may not be warranted considering the relatively small amount of costs associated with these visits. Therefore, we establish a single cost pool for no access and no trouble found. Moreover, we will use trouble counts cleared as the foundation for allocating the combined cost pool. However, because we believe no access visits should be more heavily weighted toward nonregulated activities than regulated activities, we have decided to assign the combined cost pool to regulated based on 75 percent of the ratio of regulated trouble counts cleared to total trouble counts cleared.[43] The 75 percent factor was selected because we believe: (1) it is a fair representation of the combination of no trouble found and no access; (2) it reflects that the regulated portion of the combined cost pool should be less than the ratio of the regulated trouble counts cleared to total trouble counts cleared; and (3) takes into consideration that no access is not always attributed entirely to nonregulated.

Account 2311, Station Apparatus and Account 2341, Large Private Branch Exchanges

37. For these accounts we proposed two directly assigned cost pools: regulated and nonregulated. All commenting parties support our proposal for these accounts; therefore, we adopt them.[44]

E. Quantification

38. *Proposal and Parties' Positions.* D.C. and MCI state that LECs should be required to quantify the effects of the CAM change on their regulated/nonregulated cost allocations. MCI believes that we may identify potential problems by analyzing the carriers' estimated cost shifts.[45]

39. *Discussion.* In accordance with Section 64.903(b) of our rules, the LECs must provide estimates of the effects of CAM revisions. We expect the LECs to use sound judgment and statistically valid data in making these estimates. If our audits conclude that actual results vary significantly from the estimates, we will take appropriate action.[46]

F. Implementation and Applicability

40. *Proposal and Parties' Positions.* We proposed that any required changes in cost allocation methods be implemented within 120 days after the release of the final order. Most commenting parties state that it is not feasible to incorporate these significant changes within 120 days. They argue that the changes are as complicated as any Part 32 change for which the Commission's rules allow six months for implementation. They state that in order to protect the integrity of the ARMIS Joint Cost Report and to ensure the continuity of financial data, implementation should occur on a prospective basis, at the beginning of the calendar year.[47] GTE also contends that implementation should be on a one-time basis when all phases of uniformity have been completed.[48]

41. *Discussion.* We will require LECs to implement the CAM changes discussed herein effective January 1, 1994. Implementation of these changes at the beginning of 1994 should allow for a smooth transition and make it easier for independent auditors to complete their annual CAM audits. Furthermore, this schedule will provide LECs more than six months for implementation. Because our rules require carriers to file CAM revisions at least 60 days prior to implementation, LECs must file these revisions by November 1, 1993. Finally, we will not delay implementation of the proposed CAM changes until we have completed all phases of CAM uniformity, as GTE suggests. We have not decided what additional accounts, if any, will be targeted for CAM uniformity. Before deciding, we intend to scrutinize thoroughly the LECs' implementation of the CAM revisions for these ten accounts.

G. Automated Reporting Management Information System (ARMIS)

42. We requested comment on whether any of the proposed cost allocation method changes would require modification of the ARMIS reports and, if so, what changes would be necessary. The National Association of Regulatory Utility Commissioners (NARUC) believes ARMIS should be expanded to include: the amounts in each cost pool; the allocation of these costs between regulated and nonregulated services, and between state and interstate services.[49] The CAMs do not describe how costs are allocated between jurisdictions. We therefore see little benefit in requiring carriers to report cost pool allocations by jurisdiction. On the other hand, the reporting of uniform cost pool allocations between regulated and nonregulated activities may warrant further consideration. Therefore, when we amend the ARMIS Joint Cost Report (see para. 9), we will consider the feasibility of expanding ARMIS reporting in this way.

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[43] For example, if the cost pool for no access/no trouble found was $2000 and there were 40 regulated trouble counts cleared and 60 nonregulated trouble counts cleared, an allocation using relative trouble counts cleared would assign $800 to regulated and $1200 to nonregulated. After applying the 75 percent factor, however, only $600 ($800 x .75) would be assigned to regulated and $1400 would be assigned to nonregulated.

[44] The cost pools and allocators for Account 2311 are on page 5, and the cost pools and allocators for Account 2341 are on page 6 of Appendix B.

[45] D.C. Comments at 1; MCI Replies at 3.

[46] We note that in *ex parte* communications many of the LECs submitted estimates of the effects of the proposed CAM changes. We found that these estimates contained numerous discrepancies and statistical anomalies and that they were, therefore, unreliable.

[47] USTA Comments at 5-6; Southwestern Comments at 11-12; BellSouth Comments at 21-22; CBT Comments at 7-8; GTE Comments at 12-13; NYNEX Comments at 8; Pacific Comments at 3-5; United Comments at 13; US West Comments at 8-9; GVNW Comments at 2; NYDPS Comments at 5; MCI Replies at 2-3.

[48] GTE Comments at 13.

[49] NARUC Replies at 3.

III. CONCLUSION

43. In conclusion: (1) we adopt definitions which clarify distinctions among apportionment methods; (2) we allow carriers to use sub-pools; (3) we adopt uniform cost pools and allocators for ten Part 32 accounts as shown in Appendix B; and (4) we require all LECs that file CAMs to file these changes with the Commission by November 1, 1993, and to implement them by January 1, 1994.

IV. OTHER MATTERS

44. Implementation of the modified requirements prescribed in this Order are subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act of 1980.[50]

V. ORDERING CLAUSE

45. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 215, 218, 219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-205, 215, 218, 219, and 220 and Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that the cost allocation uniformity requirements set forth in the attached Appendix B ARE ADOPTED, effective January 1, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

APPENDIX A

Parties Filing Comments

1. The Ameritech Operating Companies (Ameritech)
2. The Bell Atlantic Telephone Companies (Bell Atlantic)
3. BellSouth Corporation (BellSouth)
4. Cincinnati Bell Telephone Company (CBT)
5. GTE Service Corporation and its affiliated domestic operating companies (GTE)
6. New England Telephone and Telegraph Company and New York Telephone Company (NYNEX)
7. Pacific Bell and Nevada Bell (Pacific)
8. Rochester Telephone Corporation (Rochester)
9. Southwestern Bell Telephone Company (Southwestern)
10. The United States Telephone Association (USTA)
11. The United Telephone Companies (United)
12. U S West Communications, Inc. (U S West)
13. MCI Telecommunications Corporation (MCI)
14. The People of the State of California and the Public Utilities Commission of the State of California (California)
15. GVNW, Inc./Management (GVNW)
16. The Public Service Commission of the District of Columbia (D.C.)
17. The New York Department of Public Service (NYDPS)

Parties Filing Reply Comments

1. Bell Atlantic
2. BellSouth
3. CBT
4. GTE
5. NYNEX
6. Pacific
7. USTA
8. United
9. U S West
10. MCI
11. National Association of Regulatory Utilities' Commissioners (NARUC)

[50] 44 U.S.C. §§3510-20.

Account 2111, Land

Land used exclusively for regulated or nonregulated activities is directly assigned. Land used for both regulated and nonregulated activities is assigned to the Common Cost Pool and apportioned using the allocator shown below:

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Cost associated with parcels of land that are used entirely for the provision of regulated services.	Direct Assignment
Nonregulated	Cost associated with parcels of land that are used entirely for the provision of nonregulated services.	Direct Assignment
Common	Cost associated with parcels of land which are used for the provision of both regulated and nonregulated services.	Indirect Attribution Based on the overall investment in the Common Buildings Cost Pools.

Account 2112, Motor Vehicles

Motor vehicles that are dedicated entirely to regulated or nonregulated activities are directly assigned. Motor vehicles that are used for both regulated and nonregulated activities are assigned to one of the common cost pools and apportioned using the allocators shown below:

Direct Cost Pools	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Cost associated with motor vehicles that are used entirely for the provision of regulated services.	Direct Assignment
Nonregulated	Cost associated with motor vehicles that are used entirely for the provision of nonregulated services.	Direct Assignment
Common Cost Pools		
Central Office	Cost associated with motor vehicles used to support central office functions.	Indirect Attribution Current year salaries and wages in Accounts 2210–2232 and 6210–6232.
Distribution Services	Cost associated with motor vehicles used to support information origination/termination equipment and cable and wire facilities.	Indirect Attribution Current year salaries and wages in Accounts 2310–2441 and 6310–6441.
Network Operations	Cost associated with motor vehicles used to support network operations.	Indirect Attribution Current year salaries and wages in Accounts 6113–6124 and 6510–6535.
Customer Operations	Cost associated with motor vehicles used to support customer operations.	Indirect Attribution Current year salaries and wages in Accounts 6610–6623.
Corporate Operations	Cost associated with motor vehicles used to support corporate operations.	Indirect Attribution Current year salaries and wages in Accounts 6710–6728.
Motor Pool	Cost associated with motor vehicles used to support multiple functions.	Indirect Attribution Current year salaries and wages of those employees served by the motor pool.

Account 2121, Buildings

Buildings used exclusively for regulated or nonregulated activities are directly assigned. Buildings used for both regulated and nonregulated activities are assigned to common cost pools based on annual floor space studies and apportioned using the allocators shown below:

Directly Assigned Cost Pools	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Cost associated with buildings that are used entirely for the provision of regulated services.	Direct Assignment
Nonregulated	Cost associated with buildings that are used entirely for the provision of nonregulated services.	Direct Assignment
Directly Attributed Common Cost Pools		
Regulated	Cost associated with portions of buildings which are rented to others and are either regulated or qualify as incidental to telephone operations.	Direct Attribution -- Regulated
Nonregulated	Cost associated with portions of buildings which house nonregulated activities that do not qualify as incidental to telephone operations.	Direct Attribution -- Nonregulated
Indirectly Attributed Common Cost Pools		
Central Office	Cost associated with portions of buildings which house central office equipment and central office support personnel.	Indirect Attribution Central Office Equipment Investment in Accounts 2210–2232, excluding investment in central office equipment in buildings directly assigned to regulated or nonregulated activities.

Account 2121, Buildings

Indirectly Attributed Comon Cost Pools(cont.)	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Distribution Services	Cost associated with portions of buildings which house personnel who install, maintain, or support information origination/termination equipment or cable and wire facilities.	Indirect Attribution Current year salaries and wages in Accounts 2310–2441 and 6310–6441, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Network Operations	Cost associated with portions of buildings which house personnel who support network operations.	Indirect Attribution Current year salaries and wages in Accounts 6110–6124 and 6510–6535, excluding such wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Customer Operations	Cost associated with portions of buildings which house personnel who support customer operations.	Indirect Attribution Current year salaries and wages in Accounts 6610–6623, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.
Corporate Operations	Cost associated with portions of buildings which house personnel who support corporate operations.	Indirect Attribution Current year salaries and wages in Accounts 6710–6728, excluding such salaries and wages associated with personnel who are assigned to buildings that are directly assigned to regulated or nonregulated activities.

Account 2311, Station Apparatus

Station Apparatus is directly assigned to either regulated or nonregulated activities.

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Cost associated with station apparatus that is used entirely for the provision of regulated service.	Direct Assignment
Nonregulated	Cost associated with station apparatus that is used entirely for the provision of nonregulated service.	Direct Assignment

Account 2341, Large Private Branch Exchanges

Large Private Branch Exchange equipment is directly assigned to either regulated or nonregulated activities.

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Cost associated with large private branch exchange equipment that is used entirely for regulated services.	Direct Assignment
Nonregulated	Cost associated with large private branch exchange equipment that is used entirely for nonregulated services.	Direct Assignment

Account 6112, Motor Vehicle Expense

Expense related to construction projects or other plant specific accounts is cleared as required by Commission rules. Expense remaining in this account that exclusively relates to regulated or nonregulated activities is directly assigned. Expense that relates to both regulated and nonregulated activities is assigned to the common cost pool and apportioned based on the allocator shown below:

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Expense associated with vehicles assigned to the Direct Regulated Motor Vehicle Cost Pool.	Direct Assignment
Nonregulated	Expense associated with vehicles assigned to the Direct Nonregulated Motor Vehicle Cost Pool.	Direct Assignment
Common	Expense associated with vehicles assigned to the Common Motor Vehicle Cost Pools.	Indirect Attribution Relative investment in the Network Operations; Customer Operations; Corporate Operations; and Motor Pool Common Motor Vehicle Cost Pools.

Account 6121, Land and Building Expense

Expense that exclusively relates to regulated or nonregulated activities is directly assigned. Expense that relates to both regulated and nonregulated activities is assigned to common cost pools and apportioned based on the allocator shown below:

Direct Cost Pools	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Expense associated with land and buildings assigned to the Direct Regulated Land and Buildings Cost Pools.	Direct Assignment
Nonregulated	Expense associated with land and buildings assigned to the Direct Nonregulated Land and Buildings Cost Pools.	Direct Assignment
Common Cost Pools		
Operating Rents	Operating rents related to land and buildings which are used in regulated and nonregulated operations.	Direct Attribution Based on an analysis of the use of the rented asset.
Other Common Expense	Expense associated with land and buildings assigned to the Common Land and Building Cost Pools.	Indirect Attribution Based on the sum of the common cost pools for land and buildings.

Account 6311, Station Apparatus Expense

All productive labor expense is directly assigned to regulated or nonregulated cost pools based on the technician's time reporting. No Access/No Trouble Found visits are common expense and is apportioned to regulated and nonregulated activities based on the stated allocator. Travel expense related to single purpose regulated visits (jobs that are exclusively regulated work) is directly assigned to regulated activities. Travel expense related to single purpose nonregulated visits (jobs that are exclusively nonregulated work) is directly assigned to nonregulated activities. Travel expense related to combination visits (jobs that include both regulated and nonregulated work) is split evenly between regulated and nonregulated activities. Travel expense related to No Access/No Trouble Found visits is assigned to the No Access/No Trouble Found cost pool and apportioned based on the stated allocator.

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Expense (including travel) associated with Station Apparatus assigned to the Direct Regulated Station Apparatus Cost Pool.	Direct Assignment
Nonregulated	Expense (including travel) associated with Station Apparatus assigned to the Direct Nonregulated Station Apparatus Cost Pool.	Direct Assignment
Common – No Access/ No Trouble Found	Expense (including travel) associated with "no access/no trouble found" visits.	Indirect Attribution Regulated equals 75% of the ratio of regulated trouble counts cleared to total trouble counts cleared. Residual amount equals nonregulated.

Account 6341, Large Private Branch Exchange Expense

All productive labor expense is directly assigned to regulated or nonregulated cost pools based on the technician's time reporting. No Access/No Trouble Found visits are common expense and is apportioned to regulated and nonregulated activities based on the stated allocator. Travel expense related to single purpose regulated visits (jobs that are exclusively regulated work) is directly assigned to regulated activities. Travel expense related to single purpose nonregulated visits (jobs that are exclusively nonregulated work) is directly assigned to nonregulated activities. Travel expense related to combination visits (jobs that include both regulated and nonregulated work) is split evenly between regulated and nonregulated activities. Travel expense related to No Access/No Trouble Found visits is assigned to the No Access/No Trouble Found cost pool and apportioned based on the stated allocator.

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Expense (including travel) associated with Large Private Branch Exchange equipment assigned to the Direct Regulated Large Private Branch Exchange Cost Pool.	Direct Assignment
Nonregulated	Expense (including travel) associated with Large Private Branch Exchange equipment assigned to the Direct Nonregulated Large Private Branch Exchange Cost Pool.	Direct Assignment
Common – No Access/ No Trouble Found	Expense (including travel) associated with "no access/no trouble found" visits.	Indirect Attribution Regulated equals 75% of the ratio of regulated trouble counts cleared to total trouble counts cleared. Residual amount equals nonregulated.

Account 6362, Other Terminal Equipment Expense

All productive labor expense is directly assigned to regulated or nonregulated cost pools based on the technician's time reporting. No Access/No Trouble Found visits are common expense and is apportioned to regulated and nonregulated activities based on the stated allocator. Travel expense related to single purpose regulated visits (jobs that are exclusively regulated work) is directly assigned to regulated activities. Travel expense related to single purpose nonregulated visits (jobs that are exclusively nonregulated work) is directly assigned to nonregulated activities. Travel expense related to combination visits (jobs that include both regulated and nonregulated work) is split evenly between regulated and nonregulated activities. Travel expense related to No Access/No Trouble Found visits is assigned to the No Access/No Trouble Found cost pool and apportioned based on the stated allocator.

Cost Pool	Cost Pool Definition	Regulated/Nonregulated Apportionment Basis
Regulated	Expense (including travel) associated with Other Terminal Equipment assigned to the Direct Regulated Other Terminal Equipment Cost Pool.	Direct Assignment
Nonregulated	Expense (including travel) associated with Other Terminal Equipment assigned to the Direct Nonregulated Other Terminal Equipment Cost Pool.	Direct Assignment
Common – No Access/ No Trouble Found	Expense (including travel) associated with "no access/no trouble found" visits.	Indirect Attribution Regulated equals 75% of the ratio of regulated trouble counts cleared to total trouble counts cleared. Residual amount equals nonregulated.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 6, 1993

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Boy Scouts of America - Request for refund of a filing fee for a radio station license for a 1972 O'Day sailboat, Texas - **Denied** (June 8, 1993).

Contemporary Media, Inc. - Request for refund of a filing fee for a new FM station at Clinton, Indiana - **Granted** (May 18, 1993).

Davis, Jeffrey P. - Request for refund of a hearing fee for a new FM station at Bowdon, Georgia - **Granted** (June 3, 1993).

Dewey, Barney L. - Request for refund of a filing fee for a new FM station at Gridley, California - **Granted** (June 11, 1993).

Esty-Grossman - Request for refund of a filing fee for a new FM station at Rogue River, Oregon - **Granted** (June 14, 1993).

Fresno MSA Limited Partnership - Request for reinstatement of a cellular application at Bakersfield, California - **Denied** (June 2, 1993).

Hansen, Robert P. d/b/a Supreme Radio Co. - Request for refund of a filing fee for a new FM station at Kaukauna, Wisconsin - **Granted** (June 8, 1993).

Headley, Gene S. and Gregory S. Carpenter d/b/a Desert Willow Broadcasters - Request for refund of a hearing fee for a new FM station at Joshua Tree, California - **Granted** (May 18, 1993).

Hendren, Gayla Joy - Request for refund of a filing fee for a FM station at Bella Vista, Arkansas - **Granted** (June 11, 1993).

Kuehner, Ms. Retta M. - Request for refund of a filing fee for a formal complaint - **Denied** (May 21, 1993).

McKinney, Kean R. and Linda S. - Request for refund of a hearing fee for a new FM station at Calvert City, Kentucky - **Granted** (May 21, 1993).

Picklesimer, Robert G. - Request for refund of a hearing fee for a new FM radio broadcast station at Harold, Kentucky - **Granted** (June 16, 1993).

Powell, Ms. Gladys - Request for refund of a hearing fee for a new FM station at Gorham, New Hampshire - **Granted** (June 11, 1993).

Seaway Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Pickford, Michigan - **Granted** (May 28, 1993).

Stice Communications, Inc. - Request for refund of a hearing fee for a new FM station at Calvert City, Kentucky - **Granted** (May 21, 1993).

WSHN - Request for refund of a filing fee for a new FM radio station at L'Anse, Michigan - **Granted** (June 11, 1993).

Webber/Moore Broadcasting Company LP - Request for refund of hearing fee for a new television station at Jacksonville, North Carolina - **Granted** (June 7, 1993).

Wholey, Gail B. - Request for refund of a hearing fee for a new FM station at Gorham, New Hampshire - **Granted** (May 21, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 8 1993

Mr. Richard J. Elroy
Executive Officer
Boy Scouts of America
National Sea Exploring Committee
P.O. Box 3800
Miami, Florida 33269

Dear Mr. Elroy:

This is in response to your request for refund of the $35.00 application fee submitted by the Boy Scouts of America with its application for a license to cover a radio station installed aboard a 1972 O'Day sailboat, Texas License #9863ZC, registered to the Boy Scouts of America. In addition, you ask that the Commission exempt the Boy Scouts from the fee requirement for any future applications for a ship board radio license.

The Boy Scouts of America is a non-profit organization, exempt from federal income taxes pursuant to section 501(c)(3) of the Internal Revenue Code. You state that the Boy Scouts operate a Sea Explorer program which is designed to provide training for young men and women of high school age. The Sea Scouts operate approximately 500 boats throughout the United States. You further state that for safety reasons it is highly desirable to equip the boats with VHF radios. Further, you indicate that the boats, as well as the radios, have been donated to the program. Finally, the United States Coast Guard has waived all boat inspection fees for the Boy Scouts Sea Explorer program.

In revisiting its fee rules, the Commission addressed an earlier request for exemption by the Boy Scouts from ship inspection fees. See Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), reconsidered in part, 6 FCC Rcd 5919, 5926 (1991). There the Commission recognized that the Boy Scouts' Sea Scout program constituted a not-for-profit youth organization, but declined to grant the requested exemption.

The Commission reasoned that Congress was aware, when it enacted its Schedule of Fees governing charges for applications and other filings with the Commission, that many not-for-profit organizations, including youth oriented organizations, employ radios in conducting their programs. Nevertheless, Congress chose to exempt only a few, specific not-for-profit entities and to narrowly limit the Commission's waiver discretion to excuse organizations from the fee requirement. In addition, the Commission noted that the $320.00 ship inspection fee was not so burdensome so as to preclude the Boy Scouts from conducting its Sea

Scout program. In a broader context, the Commission explained that it could not exempt the Boy Scouts from such fees without also providing similar relief for other not-for-profit youth organizations with equally laudable purposes. Consequently, the Commission is constrained from any such action by the clear congressional intent that the Commission not adopt a broadbased waiver policy.

Accordingly, your request for exemption of the fees paid by the Boy Scouts for ship station applications must be denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 18 [illegible]

Jerold L. Jacobs, Esq.
Rosenman & Colin
1300 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Jacobs:

This will respond to your request for refund of a filing fee filed on behalf of Contemporary Media, Inc. in connection with its construction permit application for a new FM station at Clinton, Indiana.

You state, and your documentation shows, that the application of Contemporary Media, Inc. was filed prior to the Commission's establishment of a new, applicable window filing period and thus was returned in accordance with section 73.3564(d)(5). The Commission's rules specifically provide for a refund of a filing fee whenever an application is filed outside a window filing period and returned. See 47 C.F.R. §1.1111(a)(6); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985, 3 FCC Rcd 5987, 5988 (1988). Under the circumstances, refund of the filing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Robert S. Stone, Esq.
McCampbell & Young
2021 Plaza Tower
Post Office Box 550
Knoxville, Tennessee 37901-0550

Dear Mr. Stone:

This will respond to your request for refund of a hearing fee filed on behalf of Mr. Jeffrey P. Davis in connection with his construction permit application for a new FM station at Bowdon, Georgia.

You state, and your documentation shows, that prior to the Notice of Appearance deadline, Mr. Davis voluntarily dismissed his application. Under the circumstances, since Mr. Davis voluntarily dismissed his application and was not designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 11 1993

Dawn M. Sciarrino, Esquire
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-1633

Dear Ms. Sciarrino:

This is in response to your request for refund of the fee submitted by Mr. Barney L. Dewey with his application for a new FM station at Gridley, California.

The FM Branch returned Mr. Dewey's application when it determined that his application was "inadvertently accepted" for filing. See letter to Barney L. Dewey from Dennis Williams, Chief, FM Branch, dated October 7, 1992. The letter stated that because applications had been filed during the filing window for Gridley, but dismissed in hearing, the allotment was not subject to the Commission's First Come/First Serve application processing policy. See 47 C.F.R. § 73.3564(d)(4).

We find that Mr. Dewey's application was filed prior to the Commission's establishment of a new, applicable window filing period for Gridley and thus was returned in accordance with section 73.3564(d)(4) of the Commission's rules. Moreover, the Commission's rules specifically provide for refund of a filing fee whenever an application is filed outside a window filing period. See 47 C.F.R. § 1.1111(a)(6); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985, 3 FCC Rcd 5987, 5988 (1988). Under these circumstances, refund of the filing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Holleran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 14 1993

David D. Oxenford, Esquire
Fisher, Wayland, Cooper and Leader
1255 Twenty-Third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Mr. Oxenford:

This is in response to your request for refund of the filing fee submitted with Esty-Grossman Broadcasters' (Esty-Grossman) application for a new FM station at Rogue River, Oregon.

You state that Esty-Grossman filed its application on November 5, 1992, on a first come/first serve basis, because no applicant had filed for the channel during the established filing window. However, by Public Notice dated December 8, 1992, the Commission announced the receipt of an application filed prior to the Esty-Grossman application. Consequently, Esty-Grossman requested the dismissal of its application. You ask for a refund because the Commission's rules provide for a refund whenever an applicant requests dismissal of an application, filed on a first come/first serve basis, within the 15 day period following the release of a Public Notice announcing that an earlier filed application had been submitted for the same channel. See 47 C.F.R. § 1.1111(c).

Our review of this matter discloses that Esty-Grossman is entitled to a refund. Esty-Grossman requested dismissal of its application and refund of its fee payment on December 23, 1992, within the 15 day period following Public Notice of the earlier filed first come/first serve application for the channel at Rogue River, consistent with the provisions of section 1.1111(c) of the rules. Therefore, Esty-Grossman is entitled to a refund of its application fee.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 1993

William J. Sill, Esq.
Marianne H. LePera, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006

Dear Mr. Sill and Ms. LePera:

This letter responds to your request for reinstatement, nunc pro tunc, of the Bakersfield, California unserved area application filed by Fresno MSA Limited Partnership (Fresno).

Briefly, Fresno's application of March 31, 1993 was filed with an insufficient fee. You explain that a $230.00 check that was to accompany the Fresno application was inadvertently switched with a check in the amount of $60.00, and that this error caused the fee underpayment. You state that Fresno sought to remedy this defect by filing, on April 30, 1993, an Erratum to its application requesting waiver of the relevant fee filing rules or, in the alternative, deferral, nunc pro tunc, of the filing fee. You also state that Fresno submitted the appropriate $230.00 fee with its Erratum, and that this check was deposited by the Commission. Subsequently, on May 7, 1993, the Billings and Collection Branch dismissed Fresno's underlying application for fee underpayment.

In support of your request, you claim that the Commission has discretionary authority in its administration of the fee program. In this regard, you contend that while Section 8(c)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 158(c)(2), states that the Commission "may" dismiss any application for failure to pay in a timely manner, this authority is permissive and is further tempered by the power to waive or defer payment "in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 158(d)(2).

You also suggest that Commission precedent supports waiver of the rules, citing John Spencer Robinson, 5 FCC Rcd 5542 (1990). You argue that in Robinson, the Review Board reversed an ALJ's decision to dismiss Robinson's application for failure to timely file his hearing fee and Notice of Appearance, finding under those circumstances that dismissal was "unduly harsh" and was outweighed by "equitable considerations" which justified reinstatement.

You further argue that good cause exists for waiver of the rules in this case because the underpayment was the result of an "innocent error." In addition, you explain that there will be no delay in providing service to the public since this market has not been scheduled for lottery. Moreover, you believe that the Commission's mandate to collect fees will not be undermined by acceptance of Fresno's late-tendered fee because the applicant has since submitted its full fee and has pledged to pay any applicable statutory penalty. Finally, you assert that the public interest will be served by the inclusion of Fresno's application in the Bakersfield unserved area lottery because it is the existing wireline cellular licensee in the Bakersfield MSA. You argue therefore that Fresno could provide service to the unserved area in an expeditious manner, thereby benefiting the consumer.

Upon consideration of your request, we have concluded that Fresno's application may not be reinstated. Although Fresno's observation that the Commission has a flexible statutory mandate to exercise discretion in collection of its fees, Fresno does omit the provision that our rules regarding underpayments are quite clear: "[f]ilings subject to a fee under this subpart that are submitted ... with an insufficient fee ... shall be dismissed ..." 47 C.F.R. § 1.1107(b) (emphasis added). There is no dispute that Fresno submitted an insufficient fee during the filing window for the Bakersfield unserved area.

Turning to your argument that Commission precedent supports waiver of the rule, we conclude that Robinson is inapposite to the instant case. In that case, Robinson mailed a $6,000.00 check to the Commission on the last day that the Commission would accept this amount in full payment of the hearing fee, but his check was received after the hearing fee was increased to $6,760.00. The "equitable considerations" cited by Fresno -- the timing of the Commission's new fee schedule (new fees established one day before release of the Hearing Designation Order); the applicant's tender of his hearing fee and Notice of Appearance two weeks before the Notice of Appearance deadline; and his subsequent attempts to comply with the new fee schedule (following notification by the Commission's Financial Management Division two days after the Notice of Appearance deadline) -- are not persuasive here. Fresno simply failed to verify that the correct check in the appropriate amount accompanied the Fresno application.

Although the Managing Director has discretion to waive or defer fee payments where good cause is shown and where waiver would serve the public interest, see 47 C.F.R. § 1.1115(a) and (c), we conclude that Fresno has not demonstrated that it meets this standard. Fresno is an applicant that made an "innocent error" in filing its application, and we fail to see this foreseeable event as demonstrating good cause for waiver of the rules. While

we regret the result, we believe the circumstances behind Fresno's fee error are not so distinguishable from any other case involving a fee underpayment so as to warrant waiver.

Therefore, we reject the argument that the Commission's mandate to collect fees will not be undermined by acceptance of Fresno's late-tendered fee.

Accordingly, your request for reinstatement is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 8 1993

Robert P. Hansen
d/b/a Supreme Radio Company
P.O. Box 325
Oshkosh, WI 54902-0325

Dear Mr. Hansen:

This is in response to your request for a fee refund submitted on behalf of Robert P. Hansen d/b/a Supreme Radio Company (Hansen), former applicant for a new FM radio broadcast station at Kaukauna, Wisconsin.

You have requested a fee refund on the grounds that Hansen's original application was returned because it was accompanied by multiple checks, and that Hansen's resubmitted application was returned because it was filed outside the filing window.

Section 1.1111 of our rules authorizes the return or refund of a fee when an application is not timely filed in accordance with a filing window. 47 C.F.R. § 1.1111(a)(6). Because Hansen's application has been dismissed for this reason, its ~~hearing~~ filing fee may be refunded.

Accordingly, a check for $2,030.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Fullerton for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 18 1993

Kathryn R. Schmeltzer, Esq.
John M. Burgett, Esq.
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Ms. Schmeltzer and Mr. Burgett:

This will respond to your request for refund of a hearing fee filed on behalf of Gene S. Headley and Gregory S. Carpenter d/b/a Desert Willow Broadcasters ("Desert Willow") in connection with its construction permit application for a new FM station at Joshua Tree, California.

You state, and your documentation shows, that the other mutually exclusive applicants failed to submit their hearing fees. Therefore, the need for a comparative hearing was obviated.

Section 1.1111 (b)(1) of the Commission's rules provide for a refund of a hearing fee whenever an application is granted without being designated for hearing. Since Desert Willow's application was granted without a hearing, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 11 1993

Julian P. Freret, Esquire
Booth, Freret & Imlay
1233 20th Street, N.W.
Suite 204
Washington, D.C. 20036

Dear Mr. Freret:

This is in response to your request for refund of a fee submitted by Gayla Joy Hendren in connection with her application for a license to cover her construction permit for an FM station at Bella Vista, Arkansas.

You state that Ms. Hendren filed an application for a license for Station KBVA-FM, Bella Vista, Arkansas subsequent to the grant of a construction permit for the station. Before grant of the license application, Ms. Hendren filed an application to modify her construction permit which was granted. She than filed an application for a license to cover her modified construction permit.

By letter, dated August 20, 1992, the staff advised Ms. Hendren to file an amendment to her license authorization consistent with the Commission's grant of her modification application on March 3, 1992. Instead, Ms. Hendren filed a second application for a license intended to cover her construction permit and submitted the requisite fee. Under the Fee Schedule, no fee is required to amend a license following grant of an application to modify facilities. Therefore, we are satisfied that Ms. Hendren inadvertently filed her second license application and that a refund of the fee submitted with this application is appropriate. See 47 C.F.R. § 1.1111(a)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $115.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 21 1993

Ms. Retta M. Kuehner
4807 N. Willow Avenue
Bethany, Oklahoma 73008

Dear Ms. Kuehner:

This is in response to your recent letter requesting the refund of your formal complaint filing fee. You state that your complaint was returned as defective. Specifically, you request that "If no action is to be taken regarding this complaint, please refund the $120."

The formal complaint relative to your request was filed June 16, 1992. On December 9, 1992, pursuant to a review of that complaint, Thomas D. Wyatt, Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau, informed your attorney that your formal complaint was defective because it did not meet the procedural requirements of Sections 1.720 and 1.721 of the Commission's Rules. 47 C.F.R. §§ 1.720 and 1.721. In clarification, the Branch advised that "the facts presented [in the formal complaint] do not appear to demonstrate that Southwestern Bell violated its tariffs, the Communications Act, or the Commission's Rules or orders in conducting the investigation of Ms. Kuehner's harassment complaints."

It appears reasonably clear from the statement quoted above that your complaint was reviewed by the Formal Complaints and Investigations Branch and a determination made, based upon the facts presented, that there was no cause of action presented over which the Commission has the authority to assert jurisdiction.

In establishing the criteria for refunding fees, the Commission explained that "once an application has cleared the fee review process, its subsequent rejection by the relevant bureaus or offices for any reason will not result in a fee refund." Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 949 at ¶ 13 (1987).

Accordingly, your request for refund of your formal complaint filing fee is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 2 1 1993

Kean R. and Linda S. McKinney
General Partnership
Route 3, Box 250B
Calvert City, Kentucky 42029

Dear Mr. and Mrs. McKinney:

This will respond to your request for refund of a hearing fee that you filed in connection with your construction permit application for a new FM station at Calvert City, Kentucky.

You state, and your documentation shows, that prior to designation for hearing, you voluntarily dismissed your application pursuant to a settlement agreement. The Bureau approved the settlement agreement, and dismissed your application. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. § 1.1111(b)(2).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 16 1993

Michael E. Beller, Esq.
Verner, Liipfert, Bernard,
McPherson and Hand, Chartered
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005

Dear Mr. Beller:

This is in response to your Request for Hearing Fee Refund submitted on behalf of Robert G. Picklesimer (Picklesimer), former applicant for a new FM radio broadcast station at Harold, Kentucky.

You state that Picklesimer tendered a hearing fee in the amount of $6,760. You also state that on the Notice of Appearance deadline, Picklesimer and the remaining applicant filed a Settlement Agreement that contemplated dismissal of Picklesimer's application and grant of the competing application. This Agreement has been granted by the presiding ALJ and the proceeding is terminated. See Memorandum Opinion and Order, FCC 93M-280, released May 20, 1993. You now request that Picklesimer's hearing fee be refunded.

Section 1.1111(b)(4) of the Commission's rules provides for refund of the hearing fee in cases where a settlement agreement, filed by the Notice of Appearance deadline, provides for the dismissal of all but one of the applicants and the surviving application is immediately grantable or if matters specified in the designation order can be deleted. 47 C.F.R. § 1.1111(b)(4). Because Picklesimer participated in a timely filed agreement that resulted in settlement of this proceeding, the hearing fee may be returned.

Accordingly, a check for $6,760.00, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSIO
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 11 1993

Joseph P. Benkert, Esquire
Hopper and Kanouff
1610 Wynkoop Street
Suite 200
Denver, Colorado 80202-1196

Dear Mr. Benkert:

This is in response to your request for refund, with interest, of the hearing fee submitted by Ms. Gladys Powell, successful applicant for a new FM station at Gorham, New Hampshire.

Ms. Powell and one other applicant filed for the station at Gorham. Prior to designation of the competing applicants for a comparative hearing, but following Ms. Powell's submission of her hearing fee, the competing applicants filed a settlement agreement with the Mass Media Bureau providing for the grant of Ms. Powell's application and the dismissal of the remaining application. The Bureau approved the settlement agreement, dismissed the competing applicant and granted Ms. Powell's application.

Section 1.1111(b)(1) of the Commission's rules provides for the refund of a hearing fee whenever an application is granted without being designated for hearing. 47 C.F.R. § 1.1111(b)(1). Accordingly, Ms. Powell is entitled to a refund of her hearing fee. However, we must deny your request for interest since Congress, in enacting the Schedule of Fees administered by the Commission, made no provision for the payment of interest upon the refund of a fee.

Accordingly, a check, drawn in the amount of $6,760.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time. Should you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 28 1993

James R. Cooke, Esq.
Harris Beach & Wilcox
1611 N. Kent Street
Suite 1090
Arlington, Virginia 22209

Dear Mr. Cooke:

This will respond to your request for refund of a hearing fee filed on behalf of Seaway Broadcasting, Inc. ("Seaway") in connection with its construction permit application for a new FM station at Pickford, Michigan.

You state, and your documentation shows, that prior to designation for hearing, Seaway entered into a settlement agreement with its competing applicant. The Bureau approved the settlement agreement, dismissed the other application, and granted Seaway's application only after Seaway complied with the Bureau's directive by adjusting its reimbursement schedule under the settlement agreement and by complying with the Commission's environmental rules. Therefore, the need for a comparative hearing has been obviated. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(1); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5925 (1991).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 21 1993

Anne Thomas Paxson, Esq.
Borsari and Paxson
2033 M Street, N.W.
Washington, D.C. 20036

Dear Ms. Paxson:

This will respond to your request for refund of a hearing fee filed on behalf of Stice Communications, Inc. ("Stice") in connection with its construction permit application for a new FM station at Calvert City, Kentucky.

You state, and your documentation shows, that prior to designation for hearing, Stice entered into a settlement agreement with its competing applicants. The Bureau approved the settlement agreement, dismissed the other applications, and granted Stice's application only after Stice had complied with the Bureau's directive regarding the Commission's minimum spacing requirements and environmental rules. Therefore, the need for a comparative hearing has been obviated. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5925 (1991).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 12 1993

Cary S. Tepper, Esquire
Meyer, Faller, Weisman
and Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015-2113

Dear Mr. Tepper:

This is in response to your request for refund of the fee submitted by WSHN, Inc., (WSHN), for a new FM radio station at L'Anse, Michigan.

You state that WSHN filed its application pursuant to the Commission's First Come/First Serve application procedures after the staff advised WSHN's counsel that the channel at L'Anse was vacant and available on a First Come/First Serve basis. However, WSHN's application was subsequently returned because applications were not being accepted at L'Anse since no filing window existed for the channel at the time WSHN filed its application. See letter to Meyer, Faller, Weisman and Rosenberg, P.C. from Dennis Williams, Chief, FM Branch, dated March 8, 1993.

We find that WSHN's application was filed prior to the Commission's establishment of a new, applicable window filing period for the allotment at L'Anse and thus was returned in accordance with section 73.3564(d)(5) of the Commission's rules. The Commission's rules specifically provide for refund of a filing fee whenever an application is filed outside a window filing period and returned. See 47 C.F.R. § 1.1111(a)(6); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985, 3 FCC Rcd 5987, 5988 (1988). Under the circumstances, refund of WSHN's filing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Thomas M. Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 7 1993

Dennis F. Begley, Esquire
Reddy, Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

Dear Mr. Begley:

This is in response to your request for refund of the hearing fee submitted by Webber/Moore Broadcasting Company Limited Partnership (Webber), former applicant for a new television station at Jacksonville, North Carolina.

You state that Webber and the two competing applicants for the station at Jacksonville filed a settlement agreement with the presiding Administrative Law Judge prior to the deadline for filing Notices of Appearance in the comparative proceeding designated to select the licensee at Jacksonville. The presiding ALJ approved the settlement, granted a construction permit for the station to the applicant designated in the settlement agreement, and dismissed the two remaining applicants, including Webber.

Section 1.1111(b)(4) of the Commission's rules provides for the refund of a hearing fee when a settlement agreement, filed with the presiding ALJ prior to the time for filing Notices of Appearance, obviates the need for a hearing. 47 C.F.R. § 1.1111(b)(4). Our review of this matter discloses that Webber timely filed its settlement agreement for the purpose of receiving a refund and that no hearing was needed to select the appropriate licensee at Jacksonville.

Accordingly, your request is granted. We note that you have requested that the refund check be made payable to Webber/Moore and mailed directly to that entity. However, it is the practice of the Commission to refund fees to the requestor of the refund and to make the refund check payable to the maker of the original check.

Therefore, a check, drawn in the amount of $6,760.00 and made payable to the maker of the original check, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 21 1993

Shelley Sadowsky, Esq.
Rosenman & Colin
1300 19th Street, N.W.
Washington, D.C. 20036

Dear Ms. Sadowsky:

This will respond to your request for refund of a hearing fee filed on behalf of Gail B. Wholey in connection with her construction permit application for a new FM station at Gorham, New Hampshire.

You state, and your documentation shows, that prior to the designation for hearing, Gail B. Wholey voluntarily dismissed her application pursuant to a settlement agreement. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(b)(2).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

*U.S. Government Printing Office: 1993 — 342-145/80022